92-285

No.

Supreme Court, U.S.
FILED
AUG 13 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

v.

THE HONORABLE TONY LINDSAY,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court order preventing a litigant in a civil case from publishing paid political speech in local newspapers on issues of national concern during the pendency of the trial, even though the speech in no way concerns the specific facts of that case, is an unconstitutional prior restraint in violation of the right of freedom of speech protected by the First and Fourteenth Amendments.

2. Whether a state supreme court's misapplication of its own procedural requirements in refusing to adjudicate a constitutional challenge under the First Amendment constitutes an independent and adequate state ground, precluding review of that challenge in this Court.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

All of the parties to the proceeding are listed in the caption. Additional parties to the proceedings in the Texas Court of Appeals are John Eddie Williams, the attorneys of the law firm of Umphrey, Burrow, Williams, and Bailey, and the attorneys of the law firm of Ness, Motley, Loadholt, Richardson, and Poole.

Petitioner Keene Corporation has one subsidiary: Reinhold Industries. Keene Corporation has no parent corporation.

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PETITION FOR WRIT OF CERTIORARI

To The Chief Justice And Associate Justices
Of The Supreme Court Of The United States:

Petitioner Keene Corporation (hereinafter "Petitioner") prays that a writ of certiorari issue to the Supreme Court of the State of Texas:

OPINIONS BELOW

The order, issued by Respondent against Petitioner, is set forth in the Appendix at p. 11. The unpublished opinion of the Fourteenth Court of Appeals of the State of Texas, declining to vacate Respondent's order and overruling Petitioner's motion for leave to file a petition for writ of mandamus, is set forth in the Appendix at pp. 12-13.

The order of the Texas Supreme Court, dismissing Petitioner's petition for writ of mandamus, is set forth in the Appendix at pp. 16-17. The order of the Texas Supreme Court, denying Petitioner's motion for rehearing, is set forth in the Appendix at pp. 39-40.

JURISDICTION

The decision of the Court of Appeals of the Fourteenth Supreme Judicial District of the State of Texas, declining to vacate Respondent's order, was entered on March 27, 1992, with an opinion filed on April 2, 1992. The order of the Texas Supreme Court, dismissing Petitioner's petition for writ of mandamus, was entered on April 15, 1992. The order of the Texas Supreme Court, denying Petitioner's motion for rehearing, was entered on May 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions are U.S. Constitution, Amendment I and U.S. Constitution, Amendment XIV, Section 1, reproduced in the Appendix at p. 1.

STATEMENT OF THE CASE

Petitioner is a Delaware corporation with its principal place of business in New York.

Petitioner is a defendant in literally tens of thousands of asbestos products liability cases around the country. In Texas, Petitioner is a named defendant in more than four thousand of such cases, mostly in the Houston and Dallas areas. This litigation stems from Petitioner's purchase for just $8 million, in 1968, of Baldwin, Ehret-Hill

[BEH], a small manufacturer of ventilation systems, acoustical and thermal insulation products, some of which contained asbestos. Since that time, Petitioner has spent more than fifty times the purchase price of BEH, defending lawsuits based on asbestos related claims. To date, an estimated $9 billion has been spent by all defendants in this litigation, with nearly two-thirds, or $6 billion, on "transaction costs," mostly lawyers' fees. In reaction to these costs, Petitioner has taken a public position against the high cost of legal fees, punitive damages in asbestos cases, the filing of non-meritorious cases, and the legal system's general handling of the nationwide asbestos problem. It has also urged widespread political reform of that system.

Petitioner has undertaken a nationwide campaign of publication in an effort to influence the manner in which this country deals with the asbestos problem. In so doing, it has utilized various methods of communication, including letters to the editor, speeches, and opinion articles in newspapers. Examples are reproduced in the Appendix at pp. 54-69. A vital part of Petitioner's campaign has been the publication of advocacy advertisements in various papers around the country as a means of communicating its message to the American public. In these advertisements, Petitioner has urged wide-ranging legislative and executive reform of the method for dealing with the asbestos litigation crisis, on both the state and federal levels. At no point have Petitioner's advocacy advertisements commented on the facts, litigants or specific issues in a particular litigation to which Petitioner was a party. Examples of previously published advertisements appear in the Appendix at pp. 41-53.

The underlying case giving rise to this petition is a consolidated action involving twenty-two lawsuits alleg-

ing personal injury as a result of exposure to insulation products containing asbestos. Petitioner was one of the named defendants in these actions. These consolidated cases were tried in Harris County, Texas, beginning on March 16, 1992.

During pretrial hearings on March 12, 1992, counsel for the plaintiffs in these cases made an oral motion requesting that the trial judge, The Honorable Tony Lindsay of the 280th Judicial District Court of Harris County, Texas (hereinafter "Respondent"), enter an order prohibiting Petitioner from publishing any advertisements concerning asbestos in any newspaper published in Harris County, Texas. Apparently, plaintiff's counsel was responding to an advertisement which had appeared in the *Houston Chronicle* on March 5, 1992, that spoke out against the wastefulness of asbestos related litigation. A copy of that advertisement appears in the Appendix at pp. 43-44.

On March 16, 1992, Respondent entered an order, reproduced at page 2 in the Appendix, enjoining Petitioner from "plac[ing] advertisements regarding asbestos litigation in any newspaper published in Harris County, Texas until the verdict of the jury . . . is received by this Court." Respondent acted without hearing any testimony on the possible effect the order would have on Petitioner's constitutional rights or any discussion of a measure less invasive of Petitioner's free speech right than imposition of a prior restraint on Petitioner's speech.

On March 20, 1992, Petitioner filed a motion to reconsider, arguing that Respondent had available means of assuring a fair trial far less invasive of free speech rights than imposition of a prior restraint, such as admonishing the jury not to read or see anything concerning asbestos litigation or sequestering the jury. On March 24, 1992, following a hearing, Respondent withdrew her original

order and issued a second order enjoining Petitioner "from advertising regarding punitive damages and attorney's fees in reference to asbestos litigation in any newspaper published in Harris County, Texas until the verdict of the jury . . . is received by this Court." By its terms, this order was not confined in its restrictions to commentary by Petitioner concerning the specific facts, litigants or issues involved in the underlying litigation. The March 24 order appears in the Appendix at p. 11.

On March 26, 1992, Petitioner filed a motion for leave to file a petition for writ of mandamus and a petition for writ of prohibition in the Court of Appeals for the First Supreme Judicial District, Houston. Both motions were overruled by the Court of Appeals of the Fourteenth Supreme Judicial District on March 27 with opinions filed on April 2, 1992. These opinions are set forth in the Appendix at pp. 12-13 and 14-15.

Petitioner then filed a petition for writ of mandamus in the Texas Supreme Court. On April 15, 1992, the Texas Supreme Court dismissed the petition as moot, apparently because the underlying order of Respondent had expired at the end of trial. Petitioner moved for a rehearing, on the grounds that the case fell within state law's well established exception to mootness for cases that are capable of repetition yet will evade review. A copy of Petitioner's motion for rehearing appears in the Appendix at p. 18. Petitioner's motion for rehearing was denied on May 20, 1992. A copy of that denial appears in the Appendix at pp. 39-40.

Petitioner now petitions this Court for a writ of certiorari as the court of last resort to vindicate its constitutional right to speak on issues which are of great public concern and are the subject of widespread proposals for legislative reform.

REASONS FOR GRANTING THE PETITION

I.

THE INJUNCTION PREVENTING PETITIONER FROM EXERCISING ITS FREE SPEECH RIGHTS SERIOUSLY UNDERMINES SETTLED CONSTITUTIONAL PRINCIPLES AND IGNORES DECISIONS OF THIS COURT WHICH DEFINE THE PERMISSIBLE SCOPE OF INJUNCTIONS AGAINST EXPRESSION DURING LITIGATION

The injunction issued by Respondent against Petitioner represents the most invidious form of free speech regulation prohibited by the First and Fourteenth Amendments to the United States Constitution: a prior restraint of expression. This Court has long made clear that such inhibitions on speech are especially disfavored, because they stifle communication before anyone is able to measure either its wisdom or its danger. *Near v. Minnesota*, 283 U.S. 697 (1931). *See generally* Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11 (1981). As this Court stated in *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*):

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint."

See also Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). "The damage can be particularly great," this Court has stated, when—as in this case—"the prior restraint falls upon the communication of news and commentary on current events." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Thus, "the barriers to prior restraint remain high unless we are to abandon

what the [Supreme] Court has said for nearly a quarter of our national existence and implied through all of it." *Id.* at 561. Hence it is only in the most extreme situations, involving the gravest danger, that such a stifling form of regulation may be upheld.

Because gag orders such as the one issued by Respondent are classic prior restraints, this Court has long held that such orders are unconstitutional unless the expression that has been restrained is found to present a serious and imminent danger of disruption of the judicial process.[1] As this Court held in *Craig v. Harney*, 331 U.S. 367, 376 (1947), before expression may be prohibited "[t]he fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *See also Bridges v. California*, 314 U.S. 252, 263 (1941), holding that regulation

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[1] It should be emphasized that the mere fact that Petitioner's political expression would have come in the form of an advertisement does not render Petitioner's expression less protected "commercial speech." This Court has made clear that to qualify as "commercial speech" expression must propose a commercial transaction, which Petitioner's previous advertisements have not done. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). In fact, much classic political expression has come in the form of advertisements. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964), where this Court held: "That [a newspaper is] paid for publishing [a political] advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." *Cf. Keene Corp. v. Abate*, ___ Md. App. ___ (1992) (Appendix, pp. 75-76): "The paid advertisements placed by Keene . . . , like the paid advertisement in *New York Times v. Sullivan*, addressed a matter of public concern. . . . Although the message that asbestos litigation should be controlled clearly promotes Keene's economic interests, the advertisements in no way 'propose[d] a commercial transaction.' . . . In short, the advertisements simply cannot be viewed as commercial speech."

of out-of-court publications are to be governed by the clear-and-present-danger standard, described as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."

This Court has held that judicially imposed gag orders, even in criminal trials and even when confined to statements about the specific parties to or facts of the case, are only rarely permissible. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). This is because there will invariably exist alternative means to avoid prejudicing the jury that are considerably less invasive of the First Amendment interests of both the parties to the case in communicating and the public at large in receiving information concerning matters of social or political importance. These include "the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court." *Id.* at 564.

This case presents a considerably weaker justification for the restriction of expression than did the fact situation in *Nebraska Press Ass'n*, where this Court in any event found the restraint unconstitutional. First, unlike *Nebraska Press Ass'n*, the present case is a civil adjudication, rendering the special constitutional protections available only to criminal defendants irrelevant. *See, e.g.*, U.S. Constitution, Amends. VI, VIII. Second, again unlike *Nebraska Press Ass'n*, the restraint in this case goes well beyond commentary concerning the specific facts or parties to the litigation. Instead, it unconstitutionally sweeps within its reach *any* comment that Petitioner might wish to make through its advocacy advertising concerning many of the controversial general issues that arise out of the asbestos litigation debate. The injunction thus effectively precludes

Petitioner from contributing to the debate on matters that are of enormous political concern to the electorate.[2]

Also of great importance is the fact that Respondent imposed the restraint without making a finding of fact that Petitioner's advertising presented the "serious and imminent threat" that the First Amendment requires be shown before restraint may be imposed. Indeed, Respondent failed even to make a factual inquiry into this question prior to issuing the injunction. Absent such an inquiry, Respondent had absolutely no basis on which to assume that admonitions given to the jurors not to read or see anything about asbestos would be ignored. Thus, we have a situation in which a prior restraint was imposed on political expression, without even the slightest inquiry whether that expression presented a truly imminent threat of serious harm. It is difficult to imagine a more glaring violation of fundamental constitutional rights that inhere in the American political process.

II.

THE LOWER COURT'S DECISION UPHOLDING RESPONDENT'S INJUNCTION GIVES RISE TO SUBSTANTIAL UNCERTAINTY BECAUSE IT DIRECTLY CONTRADICTS A RECENT DECISION OF THE MARYLAND COURT OF SPECIAL APPEALS

The lower court's decision upholding Respondent's injunction stands in direct contrast to the recent decision of the Maryland Court of Special Appeals in the case of

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[2] As Petitioner's previously published advocacy advertisements (set forth in the Appendix at pp. 41-53) make clear, if Petitioner had been permitted to advertise during the trials before Respondent, Petitioner's comments would have been directed to the general issues surrounding asbestos litigation, not to specific facts or questions directly involved in the pending trials.

Keene Corp. v. Abate, ____ Md. App. ____ (July 1, 1992).[3] In that decision, the appellate court vacated an injunction issued by a trial judge in Baltimore, Maryland, prohibiting Petitioner from advertising about asbestos or asbestos litigation during the pendency of a trial. That injunction, which had been expressly modeled on Respondent's initial order, was similar to Respondent's injunction in all meaningful respects.[4] When the Maryland Court of Special Appeals was presented with a First Amendment challenge to the Baltimore trial court's injunction, it immediately vacated the trial court's order. Petitioner is left, then, with decisions of the appellate courts of two states reaching diametrically opposite conclusions as to the constitutionality of similar injunctions issued against it for the very same speech. In Maryland, this speech is constitutionally protected. In Texas, under current standards, it is not. Unless this Court grants certiorari, this significant uncertainty in the status of the First Amendment rights of civil litigants will remain in existence indefinitely.[5]

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[3] A copy of the opinion of the Maryland Court of Special Appeals in *Keene Corp. v. Abate* appears in the Appendix, at pp. 70-81.

[4] It is true that the order in *Abate* prohibited "advertising regarding asbestos and/or asbestos litigation" in general, while Respondent's order below ultimately prohibited only advertising "regarding punitive damages and attorneys' fees in reference to asbestos litigation." However, the two are identical for purposes of First Amendment analysis, since reform of the award of punitive damages and the method for determining attorneys' fees constitute important elements of the current political debate about the need for asbestos litigation reform.

[5] The opinion of the Texas Court of Appeals below was summary and unpublished. However, it is the very existence of Respondent's injunction that gives rise to uncertainty and unpredictability. If that injunction is allowed to stand, counsel for asbestos plaintiffs throughout the nation will undoubtedly seek to rely on it in other

(Footnote continued on following page)

III.

RESPONDENT'S INJUNCTION IS INCONSISTENT WITH NUMEROUS STATE AND FEDERAL DECISIONS INVOLVING SIMILAR FACT SITUATIONS

Numerous state and federal decisions have found that injunctions in a civil case preventing a litigant from commenting on the general political or social issues implicated in the litigation unconstitutionally infringe free speech rights. For example, in *Quinn v. Aetna Life & Cas. Co.*, 482 F. Supp. 22 (E.D.N.Y. 1979), *aff'd per curiam*, 616 F.2d 38 (2d Cir. 1980), plaintiffs in state court personal injury actions brought against Aetna sought to enjoin Aetna's further publication of two advocacy advertisements. "The thrust of both advertisements [was] that the current system for handling tort claims results in excessive jury awards which increase insurance rates." 482 F. Supp. at 25. The injunction was sought on the grounds that the advertisements allegedly were "part of 'a program calculated to tamper with juries in their deliberative process.' " *Id.* In refusing to issue the injunction, the District Court noted that "[i]n all reported cases plaintiffs have been unsuccessful in seeking an injunction against advertisements such as those in the present case . . ." *Id.* at 27. The Court concluded "that the advertisements here sought to be enjoined are entitled to First Amendment protection and could not be restrained even

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[5] *continued*

jurisdictions. Indeed, Respondent's initial order served as the basis for the injunction issued against Petitioner by the trial judge in Baltimore, vacated by the Maryland Court of Special Appeals in *Abate*. Moreover, the existence of Respondent's injunction was heavily relied upon as precedent on appeal by counsel for plaintiffs in *Abate*. The Court of Special Appeals in *Abate* made particular reference to the existence of the Texas injunction. Appendix, at p. 72.

if a valid cause of action exists. Because they are protected, plaintiffs have no cause of action in equity and the complaint must be dismissed." *Id.* at 29.

In affirming, the United States Court of Appeals for the Second Circuit stated: "We affirm the resolution of the First Amendment claim substantially for the reasons set forth in [the District Court's] thorough and considered opinion . . ." 616 F.2d at 40. To a similar effect, see *Rutledge v. The Liability Ins. Industry*, 487 F. Supp. 5 (W.D. La. 1979).

State courts considering similar questions have also found such injunctions to violate the First Amendment. In *Kemner v. Monsanto Co.*, 112 Ill. 2d 223, 492 N.E.2d 1327 (1986), the Illinois Supreme Court found that a lower court's gag order preventing a corporate defendant from communicating with the media concerning the litigation constituted a First Amendment violation. The Illinois Supreme Court could "find no substantial evidence to justify the circuit court's conclusion that a 'serious and imminent threat to the fair administration of justice' existed because of Monsanto's communication with the media regarding the present case." *Id.* 112 Ill. 2d at 245, 492 N.E.2d at 1337. *See also NYPIRG v. Insurance Information Institute*, 140 Misc. 2d 920, 531 N.Y.S.2d 1002 (Sup. Ct. 1988).

Courts have been especially hesitant to regulate a litigant's expression that does not concern the specific facts of the trial. *See Ruggieri v. Johns-Manville Prods. Corp.*, 503 F. Supp. 1036, 1040 (D.R.I. 1980) (emphasis added): "[T]he only comment that can be proscribed, when no other protective alternative exists, is *that which in some meaningful way is targeted to the case to be tried* and which poses a 'serious and imminent threat' to that trial." *See also State v. Cottman Transmission Systems, Inc.*,

75 Md. App. 647, 542 A.2d 859, 865 (Spec. App. 1988) (limiting gag order "so as to proscribe any comments relative to the merits of the case.")

Standing apart from all these decisions is the injunction issued by Respondent and upheld by the Texas appellate court. As in those cases, the present case involves an attempt to enjoin a litigant's expression on general issues of great political interest that happens to occur during a pending civil litigation. Unlike all of the other decisions, the lower courts in the present case completely ignored the severe threat to free speech interests and authorized the stifling of Petitioner's First Amendment rights by means of a prior restraint. Hence, if the lower courts' decisions are allowed to stand, they will introduce into the law a line of precedent, undermining the constitutional right of free expression, that is diametrically opposed to previously well-established state and federal doctrine.

In sum, both Respondent's injunction and the Texas appellate court's decision summarily upholding it stand in stark contrast to decisions of this Court, as well as decisions of other state and federal courts, recognizing the need to protect the constitutional rights of litigants to comment on matters of public importance. Moreover, the inconsistency between the lower court decision in the present case and the contemporaneous decision of the Maryland Court of Special Appeals in *Keene Corp. v. Abate* can only give rise to chilling and debilitating uncertainty and unpredictability in the protection given to the free speech rights of litigants in civil trials.

For all of these reasons, Petitioner respectfully urges this Court to grant Petitioner's request for a writ of certiorari in the present case.

IV.

THIS COURT HAS JURISDICTION TO HEAR THIS CASE

A. This Case Is Not Moot Because Under Federal Law This Matter Is Capable Of Repetition Yet Will Always Evade Review

It is doubtless true that this Court requires a case or controversy in order to invoke its jurisdiction. U.S. Const., Art. III, §2. In this case, the underlying order issued by Respondent terminated on its own terms at the end of trial. This fact would normally prevent a judicial determination by this Court. However, this exact situation is very likely to recur the next time Petitioner has a products liability trial. Petitioner's speech rights will be abridged again, without Petitioner ever being provided the opportunity to vindicate its rights in this Court, due to the inherently short-lived nature of the order.

Under federal law, this case clearly falls within the "capable-of-repetition-yet-evading-review" exception to normal principles of mootness. This Court has jurisdiction if there is a "reasonable likelihood" or a "demonstrated probability" that Petitioner will again suffer the deprivation of constitutional rights that gave rise to this suit, and the challenged action in its duration will be too short to be fully litigated prior to its cessation or expiration. *Honig v. Doe*, 484 U.S. 305, 318, 323 (1988); *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (*per curiam*).

This case easily meets the requirements for the "capable-of-repetition-yet-evading-review" exception. First, Petitioner has been and continues to be involved in a nationwide publicity campaign in the mass media involving important political issues, including the excessive cost of our legal system, and the propriety and efficacy of punitive damages, particularly in the context of asbestos litigation.

Moreover, Petitioner continues to be involved as a defendant in thousands of lawsuits in the Texas courts. There is every reason to believe that this stream of cases will continue for the foreseeable future. Therefore, there is at the very least a "reasonable likelihood," if not a virtual certainty, that Petitioner will again be placed in a position where it will seek to publish a political advocacy advertisement while it is a civil defendant in the Texas courts.

Just as likely is the probability that Petitioner will be enjoined by the Texas courts from advertising during the pendency of those trials. Counsel for plaintiffs in the underlying litigation continues to represent thousands of other asbestos plaintiffs in the Texas courts, and there is every reason to believe that similar injunctions will be sought in all future cases. To date, the state courts of Texas have shown that when such injunctive relief is requested, it will be granted, as Respondent's decision here demonstrates. Indeed, another Texas trial judge recently held Petitioner in contempt for publishing an advocacy advertisement during a trial, even though no order had been violated by such publication. *Orsak v. Keene Corp.*, order of Hon. Sharolyn Wood, District Court of Harris County, Texas, 127th Judicial District, June 1, 1992.

Any such future order will be effectively insulated from review in this Court in exactly the same manner that this order was. The normal trial of an asbestos products liability case takes from two to six weeks. There is no way that Petitioner can appeal through the Texas court system, let alone apply for and obtain a writ of certiorari from this Court, before the end of a trial in a Texas court. Therefore, any such order is inherently too short in its duration to be fully litigated prior to its expiration.

There is, then, a strong likelihood that Petitioner will once again be subjected to a Texas judge's injunction prohibiting its protected speech activities, and that any future attempt to litigate that order will, as here, be deemed moot because of the expiration of the underlying order. This case is virtually identical on this point to this Court's decision in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). There, this Court granted review, even though the case was technically over, because the issue was one capable of repetition yet evading review. This Court reasoned that

> if [the criminal defendant's] conviction is reversed by the Nebraska Supreme Court and a new trial ordered, the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity before [the criminal defendant's] retrial. Second, the State of Nebraska is a party to this case; the Nebraska Supreme Court's decision authorizes state prosecutors to seek restrictive orders in appropriate cases. The dispute between the State and the petitioners . . . is thus "capable of repetition." Yet, if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, or at least considered plenary review in this Court, *since these orders are by nature short-lived*. 427 U.S. at 546-47 (emphasis added).

The likelihood of repetition of the challenged conduct in this case is considerably stronger than in several decisions in which this Court invoked the capable-of-repetition-yet-evading-review exception. *See, e.g., Honig v. Doe*, 484 U.S. 305 (1988) (likelihood that twenty-year-old emotionally handicapped individual who was no longer resident of school district that had suspended him and who had no plans to return to school in foreseeable future would return to school and be illegally disciplined); *Roe v. Wade*, 410 U.S. 113 (1973) (likelihood that litigant would once again become pregnant).

There will be no better opportunity to protect Petitioner's constitutional rights in the future. Therefore, this Court should apply the capable-of-repetition-yet-evading-review exception and hear Petitioner's First Amendment challenge.

B. The Decision By The Texas Supreme Court That This Case Is Moot Is Not An Independent And Adequate State Ground Preventing Review In This Court

The Texas Supreme Court, without opinion, dismissed as moot Petitioner's appeal from the appellate court's denial of its writ of mandamus. On motion for rehearing, that Court continued to adhere to its position, though Petitioner had demonstrated beyond question that Texas case law unambiguously recognizes an exception to the mootness doctrine for constitutional cases capable of repetition yet evading review. The decisions of the Texas Supreme Court should not be deemed to stand on an independent and adequate state ground which would preclude review in this Court.

It is a familiar constitutional principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions. However, the justification for this deference to state courts has reduced application where the state ground relied upon is purely procedural. *Henry v. Mississippi*, 379 U.S. 443, 446-47 (1965); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

A state court's refusal on the grounds of mootness to consider a federal claim does not preclude this Court's independent determination of the question of mootness. That issue is itself a question of federal law, which this

Court must ultimately decide. *Henry v. Mississippi*, 379 U.S. at 447; *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964).

In *Liner*, a Tennessee state trial judge had enjoined a labor union's picketing at a construction site. The union argued that the state courts had no jurisdiction to issue an injunction because, under federal law, the labor dispute was within the exclusive domain of the National Labor Relations Board. The trial court refused to dissolve the injunction, finding there was no "bona fide" labor dispute between the parties and therefore it had jurisdiction. 375 U.S. at 303. On appeal, the Court of Appeals of Tennessee found that the construction on the site had been completed, and therefore, "this case had become moot." *Id.* at 303-304. Nevertheless it affirmed the trial judge's finding that a bona fide labor dispute did not exist. *Id.* After the Supreme Court of Tennessee denied certiorari, this Court took the case.

In discussing respondent's challenge to this Court's jurisdiction because of mootness, this Court stated:

> The argument is that we are bound by the state appellate court's holding that this case was rendered moot by the completion of construction. We think, however, that in this case the question of mootness is itself a question of federal law upon which we must pronounce final judgment.

Liner v. Jafco, Inc., 375 U.S. at 304.

Similarly here, this Court is not bound by the Texas Supreme Court's pronouncement that the matter is moot. Instead, this Court must perform its own independent mootness analysis under federal law. As already demonstrated (*See* discussion *supra* at pp. 14-16), such an analysis clearly reveals that the case falls within the established exception to mootness for issues that are capable of repetition yet will evade review.

Even if one proceeds on the assumption that the issue of mootness at the state court level is purely a matter of state law, under well established decisions of this Court the Texas Supreme Court's findings of mootness in this case cannot serve as an independent and adequate state ground, barring review. This Court has long held that a state court's application of its own procedural rules to bar determination of a federal issue will not prevent review in this Court, if the state court has misapplied its own procedural law. As this Court held in *Ward v. Love County*, 253 U.S. 17, 22 (1920), "[i]t . . . is within our province to inquire not only whether the [federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support. . . ."

This Court's decision in *Rogers v. Alabama*, 192 U.S. 226 (1904), is directly in point. There the defendant had moved to quash a murder indictment on the grounds that African-Americans had been systemically excluded from the grand jury. However, the Alabama Supreme Court refused to consider the motion on grounds that it was "prolix." Justice Holmes, speaking for this Court, reversed, noting that the motion consumed only two pages in the printed record. While Justice Holmes did not deny that prolixity might, in the abstract, serve as an independent and adequate procedural state ground, he refused to accept without question the state court's decision that that procedural barrier was applicable. Also controlling is *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964). There, the Alabama Supreme Court had held that failure to comply with a state procedural rule barred the NAACP from raising its constitutional challenge. This Court responded: "Paying full respect to the state court's

opinion, it seems to us crystal clear that the rule invoked by it cannot reasonably be deemed applicable to this case." 377 U.S. at 296.

Similarly, in this case it may be perfectly appropriate, in the abstract, for the Texas Supreme Court to refuse to adjudicate issues of federal law on mootness grounds. However, the Texas Supreme Court may not misapply that state law ground in order to bar review in this Court. It is, then, both necessary and appropriate in this case for this Court to inquire into whether the Texas Supreme Court accurately applied its own procedural rules in refusing to adjudicate Petitioner's federal constitutional challenge. Such an examination reveals unambiguously that that court failed properly to apply its own exception to the mootness doctrine for cases that are capable of repetition yet will evade review, despite Petitioner's argument, on its motion for rehearing, that this exception controlled.

Under Texas law, it is well established that a case is not considered moot if the situation is capable of repetition yet will evade review. This exception is applied where the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot. *General Land Office v. Oxy U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990). Under Texas law, this exception is applied when—as in this case—a party seeks to challenge allegedly unconstitutional acts performed by the government. *See State v. Lodge*, 608 S.W.2d 910 (Tex. 1980) (challenging unconstitutional mental commitment by state); *Iranian Muslim Organization v. City of San Antonio*, 615 S.W.2d 202 (Tex. 1981) (challenging prior restraints on free speech by city).

Under prior Texas precedent this case presents the perfect instance for application of the capable-of-repetition-yet-evading-review exception. As noted *supra* at pp. 14-16,

Petitioner has been engaging in a nationwide pattern of advocacy and publication regarding the need for reform of the legal system, including the excessive and repetitive award of punitive damages and excessive legal fees. Petitioner has every intention of continuing this program, throughout the nation. Moreover, Petitioner is currently involved in thousands of lawsuits in Texas, with additional suits being filed constantly, making it a virtual certainty that in a different trial, a trial judge of the State of Texas will enjoin Petitioner's publication of advertisements during the pendency of one of these numerous trials. In addition, "[b]ecause temporary orders imposing prior restraints upon free speech are by nature short-lived," this case falls within Texas' application of the exception for cases that are capable of repetition yet evading review. *Iranian Muslim Organization v. City of San Antonio*, 615 S.W.2d at 209 (Tex. 1981). The Texas Supreme Court clearly has misapplied Texas mootness law by finding this case to be moot. As a result, there is no jurisdictional bar to this Court's granting certiorari.

CONCLUSION

This case presents an issue of federal constitutional policy of tremendous importance: The impact of a prior restraint on a litigant's constitutional right to comment on political issues during the pendency of the trial. Both Respondent's order and the Texas appellate court's decision upholding it clearly depart from decisions of this Court, as well as of numerous state and federal courts, in unconstitutionally stifling Petitioner's free speech right. Moreover, unless this Court agrees to review Respondent's injunction, significant unpredictability in First Amendment interpretation will result, because of the dramatic differences between the decisions of the Texas courts and the opinion of the Maryland appellate court on the exact same issue.

If the state supreme court is permitted to misapply the state's own exception for cases capable of repetition yet evading review, it will be able effectively to insulate for all time this significant constitutional violation from this Court's review. Both the constitutional rights of free expression and this Court's primacy within the federal system will be severely undermined as a result. For these reasons, this Court should find that no independent and adequate state ground supports the Texas Supreme Court's refusal to consider Petitioner's First Amendment challenge, and grant the petition for a writ of certiorari.

Respectfully submitted,

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UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NO. 84-69709

BENJAMIN C. WILLIAMS AND NEOMA WILLIAMS	§	IN THE DISTRICT COURT OF
v.	§	HARRIS COUNTY, TEXAS
AC&S, INC. ET AL.	§	280TH JUDICIAL DISTRICT

ORDER

BE IT REMEMBERED that on this day commenced the consolidated trial in the 280th District court of the above-named Plaintiffs against the Keene Corporation. From this day until the verdict of the jury is received by this Court, the Defendant Keene Corporation is prohibited from advertising regarding asbestos litigation in any and all newspapers which are published in Harris County, Texas. Attached as Exhibit "A" to this Order is a copy of an advertisement which the Defendant Keene Corporation placed in the *Houston Chronicle*, a Harris County Newspaper, on March 5, 1992. On that same day in Harris County a jury was deliberating in a trial in which the Defendant Keene Corporation was a party. It is therefore,

ORDERED, ADJUDGED AND DECREED that Keene Corporation shall not advertise regarding asbestos litigation in any newspaper published in Harris County, Texas until the verdict of the jury in the above-referenced cases is received by this Court.

SIGNED the 16th day of March, 1992.

/s/ TONY LINDSAY
JUDGE PRESIDING

CAUSE NO. 85-50166

JIMMY R. BLEVINS and SANDRA R. BLEVINS	:	IN THE DISTRICT COURT OF
vs.	:	HARRIS COUNTY, TEXAS
A. C. and S., INC., ET AL.	:	280TH JUDICIAL DISTRICT

STATEMENT OF FACTS
EXCERPT OF PROCEEDINGS
MARCH 24, 1992

BE IT REMEMBERED that the above entitled and numbered cause came on for Trial before said Honorable Court, Tony Lindsay, Judge Presiding, at the Civil Courts Building, 301 Fannin, Houston, Texas, on the 24th day of March, 1992, and the following proceedings were had:

APPEARANCES

FOR PLAINTIFFS JIMMY R. BLEVINS AND SANDRA R. BLEVINS, ET AL:

MR. JOHN EDDIE WILLIAMS
MR. ERIC BOGDAN
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Houston, Texas 77017

MR. JOSEPH COX, JR.
Ness, Motley, Loadholt, Richardson & Poole
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P.O. Box 1137
Charleston, South Carolina 29402

MR. CAMERON WADDELL
Ness, Motley, Loadholt, Richardson & Poole
2202 Jackson Street
P.O. Box 365
Barnwell, South Carolina 29812

FOR DEFENDANT KEENE CORPORATION:

MR. JAMES H. POWERS
MS. GWEN FROST
Roberts, Markel, Folger & Powers
1010 Twenty-Four, Greenway Plaza
Houston, Texas 77046

FOR DEFENDANT PITTSBURGH-CORNING:

MR. JOHN H. CUMMINGS
Hassard, Bonnington, Rogers & Huber
50 Fremont Street
Suite 3400
San Francisco, California 94105

MR. NICHOLAS S. BALDO
Weller, Wheelus & Green
P.O. Box 350
Beaumont, Texas 77704-0350

THE COURT: With regard to Mr. Powers' motion, I haven't seen a copy of it yet, but I assume that Mr. Williams has.

MR. POWERS: Here is a copy, Your Honor.

THE COURT: Okay. What is Mr.—who wants to reply to his motion? Anybody?

MR. WILLIAMS: I guess, well, Judge, it's a motion for reconsideration and you know—

THE COURT: The only difference that I see now is that he gave me a copy of about six cases that I took home last night. I don't know if—I assume they are the same ones that you have got.

MR. POWERS: Yes, ma'am. They are all the ones listed in the motion.

THE COURT: So have you read or referred or—

MR. WILLIAMS: I am not had an opportunity to read and analyze those cases, so I am kind of—

THE COURT: Okay. What it seems to me like is that we probably have an order that is broader than it has to be to do what I wanted to do to begin with. The order does not prevent—regardless of what my view may be on whether they should or not, it does not prevent Mr. Keene's client from talking to the news media, it does not prevent a news article, does not prevent them going and talking to groups or whoever this is they want to talk to. They can even go door to door if they want to. At least that's not prohibited by the order.

MR. WILLIAMS: But not to any of our 13 jurors.

THE COURT: Well, yes. They really get in trouble if they go to them. But it was never particularly my intention to prohibit them from running an advertisement in the paper which would say we sold asbestos products in such and such a year and asbestos causes cancer and we contend this or that with regard to whether it does or doesn't cause cancer or whatever.

What my intention was is to prohibit any inflammatory advertisement directed at jurors on the subject of attorneys fees and punitive damages. Like the ad that your client ran when the jury was deliberating in Judge Wood's court.

Now, I don't know if to narrow that order, if it would be appropriate to say that they are prohibited from advertising regarding asbestos litigation, except for facts in contention that have been brought out in this trial or have been brought out in some other trial. I don't know how to—you are not going to get it out in trial, I assume, that legal fees are up, up and away. If you put it that way, would that cover what we are really wanting to cover?

MR. WILLIAMS: Yes, Your Honor.

THE COURT: Okay. Then draw me up another order.

MR. POWERS: Your Honor, I still think that the court would be exceeding its power in making any order that

restrains Keene from speaking, based on the content of the speech before the speech is uttered and I think that's the thrust of all of the cases that both our Supreme Court, Texas Supreme Court and the United States Supreme Court, that common thread runs throughout all of the first amendment cases that prior restraints are just on their face invalid. And there hasn't been any showing—I know the court's read Nebraska Press Association vs. Stewart because I gave it to you yesterday and I think that case is very instructive. In that case, if the court recalls, the State court in Nebraska prohibited the newspapers from talking to the prosecutors in a criminal case. And Nebraska Press Association took it up. And the Supreme Court paid particular attention to the fact there had been no showing at the trial court level that other means of protecting the fairness of the trial, which was the court's purpose in that case in entering the gag order in the first place that no alternative measures had been examined and found wanting.

And one of the ones that they suggested would take care of the problem would be for the court to instruct the jury on whatever issue it was that would be subject to the news articles and I know that you, Your Honor, when you gave this jury their instructions, told them not to read anything, not to discuss anything, not to look at anything in the newspaper. And I think that instruction, we have to presume the jury's going to follow. And even if the court gives that instruction on a periodic basis, like perhaps every day, if the jury follows the court's instructions, then our advertising which we are directing at the public at large and not at any specific jury, then our advertising—we can get our purpose served and if the court can get its purpose served by insulating this jury from whatever effects the ad may have on their deliberations,

then I think that's the proper way to do it under the first amendment.

If it turns out—if the plaintiffs or the court is able to establish that that, in fact, is not sufficient to protect the integrity of the trial, then I think maybe we readdress the matter on proper motion and examine it. And just look at the issue again.

But I think any prior restraint of Keene's speech is impermissible under the First Amendment, and that's the basis of our motion.

THE COURT: Okay. If they hadn't already managed to speak that speech recently and if they were being restrained for a very long time, I probably would agree with you. Considering that they have already made the speech to this audience and that they are only being restrained for something like two and a half to three weeks, I think that their interest in being able to inflame the jury pool is so little that it doesn't keep us from entering this order. But I do want a less restrictive order.

MR. WILLIAMS: Sure, Judge. We must always balance—the First Amendment, of course, is important but also the amendment that gives us the right to a trial by jury is also of equal importance and found in the same Constitution. And must always balance things. It always comes down to balancing. That's what we are just asking the court to do. I think the court struck a very good balance.

MR. POWERS: One of the problems with what you said, I guess, is that—well, in addition to the fact that I disagree with everything you said, but one of the specific factual problems with what you said is that it's true that the court's order is only for the pendency of this trial. That is even—if it's just while this jury is deliberating. But if you will recall during our pre-trial when we

first discussed this issue, you yourself recognized that we are subject to trial settings virtually every week in Harris County. It's conceivable, and I think likely, if you enter this order, that other courts may do the same thing and Keene will be faced with the prospect of never being able to express its views on the affect of asbestos litigation on our judicial system and our economy so long as there is a trial setting in Harris County because, for example, I have been in trial almost every day in an asbestos case since February 3rd of 1992 and had such an order been entered on February 3rd, 1992, it's now March 24th, isn't it? And Keene would not yet be able to express its views, would be facing probably another week or so of being unable to express its views and I know that I am set for trial sometime in the middle of April in Judge Cochran's court. So I think there is a very real danger that this type of order is going to completely prohibit Keene from expressing any views on asbestos litigation.

THE COURT: Are you all set—my two weeks will be up at the end of this week. Are you all set next week for asbestos cases?

MR. WILLIAMS: I don't believe so.

MR. POWERS: Not in Harris County as far as I know.

THE COURT: So the next setting is Judge Cochran's court in the middle of April?

MR. COX: It's the 27th.

THE COURT: I'm only talking about Harris County.

MR. POWERS: I know. But you are not leaving us much of a window. There is nothing to keep you from advising during those two weeks after my case ends and hers begins—

THE COURT: And if you are so inflammatory, I don't know what she is going to do with you. But—

MR. POWERS: Judge, I don't think we are inflammatory, No. 1.

I don't know what the court's ruling is. I know what the court's intention is.

THE COURT: My ruling is they have got to give me a less restrictive order.

MR. POWERS: Does that mean this order is still in effect?

THE COURT: For the moment, yes.

MR. POWERS: So you are denying my motion?

THE COURT: Sort of.

MR. POWERS: I don't mean to quibble but, Judge, I think I told you when they first asked for this, we would take some action and just so the court knows, I intend to.

THE COURT: Well, I am granting your motion but the order's still in effect until I get the other one which I assume will be probably about the end of the day. But I am granting the motion in part, obviously.

MR. POWERS: I understand.

THE COURT: You guys go to lunch.

(Court in recess).

(END OF EXCERPT.)

STATE OF TEXAS)
)ss.
COUNTY OF HARRIS)

I, LaVearn Ivey, Certified Shorthand Reporter, hereby certify that I attended the proceedings in the above numbered and styled cause.

I further certify that I reported same in shorthand and later reduced it in writing.

I further certify that the foregoing 15 pages contain a true and accurate representation of my shorthand notes so taken as aforesaid to the best of my knowledge and belief.

WITNESS MY HAND this the 26th day of MARCH, A.D., 1992.

/s/ LaVearn Ivey
Certified Shorthand Reporter
301 Fannin, Room 512
Houston, Texas 77002
221-5790
Certificate No. 822
Expires 12-31-92

NO. 84-69709

BENJAMIN C. WILLIAMS AND NEOMA WILLIAMS	§	IN THE DISTRICT COURT OF
v.	§	HARRIS COUNTY, TEXAS
AC&S, INC. ET AL.	§	151ST [sic] JUDICIAL DISTRICT

ORDER

BE IT REMEMBERED that on March 16, 1992 commenced the consolidated trial in the 280th District court of the above-named Plaintiffs against the Keene Corporation. From this day until the verdict of the jury is received by this Court, the Defendant Keene Corporation is prohibited from advertising regarding punitive damages and attorney's fees in reference to asbestos litigation, in any newspapers which are published in Harris County, Texas. Attached as Exhibit "A" to this Order is a copy of an advertisement which the Defendant Keene Corporation placed in the *Houston Chronicle*, a Harris County Newspaper, on March 5, 1992. On that same day in Harris County a jury was deliberating in a trial in which the Defendant Keene Corporation was a party. It is therefore,

ORDERED, ADJUDGED AND DECREED that Keene Corporation shall not place advertisements regarding punitive damages and attorney's fees in reference to asbestos litigation, in any newspaper published in Harris County, Texas until the verdict of the jury in the above-referenced cases is received by this Court. The ORDER of MARCH 16, 1992 prohibiting KEENE from advertising is WITHDRAWN.

SIGNED the 24th day of March, 1992.

/s/ TONY LINDSAY
JUDGE PRESIDING

[SEAL OF THE STATE OF TEXAS]

In The
Fourteenth Court of Appeals

NO. C14-92-00312-CV

KEENE CORPORATION, Relator

V.

THE HONORABLE TONY LINDSAY, JOHN EDDIE WILLIAMS, THE ATTORNEYS OF THE LAW FIRM OF UMPHREY, BURROW, WILLIAMS, AND BAILEY and THE ATTORNEYS OF THE LAW FIRM OF NESS, MOTLEY, LOADHOLT, RICHARDSON, AND POOLE, Respondents

ORIGINAL PROCEEDING
WRIT OF MANDAMUS

OPINION

On March 16, 1992, respondent, the Honorable Tony Lindsay, ordered that relator is prohibited from advertising regarding asbestos litigation in any and all newspapers that are published in Harris County, Texas.

Relator asks that we order Judge Lindsay to vacate that order. We decline to do so and overrule the motion for leave to file petition for writ of mandamus.

PER CURIAM

Motion for leave to file Petition for Writ of Mandamus Overruled March 27, 1992 and Opinion filed April 2, 1992.

Panel consists of Justices Junell, Robertson, and Draughn. (Justice Robertson not participating).

Do not publish - TEX. R. APP. P. 90.

[SEAL OF THE STATE OF TEXAS]

In The
Fourteenth Court of Appeals

NO. C14-92-00309-CV

KEENE CORPORATION, Relator

v.

THE HONORABLE TONY LINDSAY, JOHN EDDIE WILLIAMS, THE ATTORNEYS OF THE LAW FIRM OF UMPHREY, BURROW, WILLIAMS, AND BAILEY and THE ATTORNEYS OF THE LAW FIRM OF NESS, MOTLEY, LOADHOLT, RICHARDSON, AND POOLE, Respondents

ORIGINAL PROCEEDING
WRIT OF PROHIBITION

OPINION

On March 16, 1992, respondent, the Honorable Tony Lindsay, ordered that relator is prohibited from advertising regarding asbestos litigation in any and all newspapers that are published in Harris County, Texas.

Relator, in cause no. C14-92-00312-CV, asks that we order Judge Lindsay to vacate that order. In this action, relator asks that we prohibit respondents, John Eddie Williams, the attorneys of the law firm of Umphrey, Burrow, Williams, and Bailey and the attorneys of the law firm of Ness, Motley, Loadholt, Richardson, and Poole, from requesting such an order in future asbestos litigation. Having overruled the motion for leave to file writ of

mandamus in cause no. C14-92-00312-CV, we overrule the motion for leave to file petition for writ of prohibition.

PER CURIAM

Motion for leave to file Petition for Writ of Prohibition Overruled March 27, 1992 and Opinion filed April 2, 1992.

Panel consists of Justices Junell, Robertson, and Draughn. (Justice Robertson not participating).

Do not publish - TEX. R. APP. P. 90.

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

April 15, 1992

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RE: Case No. D-2264
Style: KEENE CORPORATION
v. THE HONORABLE TONY LINDSAY, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas dismissed as moot relator's motion for leave to file petition for writ of mandamus in the above styled case. (Chief Justice Phillips not sitting.)

Sincerely,
John T. Adams, Clerk

by /s/ BLANCA E. MORIN
Blanca Morin, Deputy

cc: Mr. Joe Cox
Honorable Tony Lindsay

IN THE TEXAS SUPREME COURT

KEENE CORPORATION,
Relator

vs.

HONORABLE TONY LINDSAY,
Respondent

RELATOR'S MOTION FOR REHEARING

Respectfully Submitted,

ROBERTS, MARKEL, FOLGER & POWERS

By: JAMES H. POWERS
KENNETH C. BAKER
Weslayan Tower, Suite 1010
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ATTORNEYS FOR RELATOR

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IN THE TEXAS SUPREME COURT

KEENE CORPORATION,
Relator

vs.

HONORABLE TONY LINDSAY,
Respondent

RELATOR'S MOTION FOR REHEARING

Respectfully Submitted,

ROBERTS, MARKEL, FOLGER & POWERS

By: JAMES H. POWERS
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(713) 840-1666

ATTORNEYS FOR RELATOR

TO THE HONORABLE JUSTICES OF SAID COURT:

Keene Corporation files the following Motion for Rehearing:

I.

On April 15, 1992, this Court dismissed as moot Relator's Motion for Leave to File Petition for Writ of Mandamus. This court erred in dismissing Relator's Motion for Leave to File Petition for Writ of Mandamus because the issues presented therein are capable of repetition, yet evading review and therefore are not moot.

II.

The name and addresses of the attorneys of record for the parties to the trial court's order are:

Mr. James H. Powers
Roberts, Markel, Folger & Powers
24 Greenway Plaza
Houston, Texas 77046

Mr. John E. Williams
Umphrey, Burrow, Williams & Bailey
8441 Gulf Freeway, Suite 600
Houston, Texas 77017

Mr. Frank Bean
Bean and Manning
1500 San Felipe Plaza
5847 San Felipe Road
Houston, Texas 77057

The remaining party to the trial court's order is:

Honorable Tony Lindsay
280th Judicial District Court
Harris County Courthouse
Houston, Texas 77002

III.

In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), the United States Supreme Court considered a Nebraska trial court's order which prohibited publication by the press of certain information pertaining to a criminal trial. The order expired by its terms when the jury in the case was impaneled. *Id.* at 546. Before the Supreme Court could hear the matter, the Defendant had been convicted and sentenced to death. *Id.* Nevertheless, the Court held that "jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one capable of repetition, yet evading review." *Id.* The Court further held that if it declined to consider the issues presented on the grounds of mootness, "the dispute [would] evade review, or at least considered plenary review . . . by [the] Court since these orders are by nature *short lived*." (emphasis supplied) *Id.* at 547. This principle was recognized by the Texas Supreme Court in *State v. Lodge*, 608 S.W.2d 910, 912 (Tex. 1980) and again in *Iranian Muslim Org'n v. City of San Antonio*, 615 S.W.2d 202, 209 (Tex. 1981).

IV.

The same scenario is presented here. While the order complained of has expired, the issue almost certainly will repeatedly confront Relator in each asbestos-related personal injury trial setting in Harris County which involves Plaintiffs' counsel below, John Williams. Attached as Exhibit "A" is a current listing of Relator's asbestos-related trial settings in Harris County involving Mr. Williams. Indeed, Mr. Williams has expressed his intention to move for an order similar to that entered by Judge Lindsay in other cases involving Keene as a Defendant. Keene believes

that other judges, without appropriate guidance from this Court, will continue to accede to Plaintiff counsels' demands for such orders.

V.

At least one judge, Judge Sharolyn Wood of the 127th Judicial District Court of Harris County, has expressed an intention to enter an order similar to Judge Lindsay's in future cases involving Keene. Indeed, Judge Wood has entered two other orders touching upon this very sensitive issue. On April 8, 1992, Judge Wood entered an order requiring Keene to produce all documents related to its advertisement placed in the *Houston Chronicle* on March 6, 1992. See Exhibit "B". It is the placement of this advertisement which prompted Judge Lindsay to enter the order made the subject of Relator's petition for Writ of Mandamus before this Court. Following filing of a Motion for Leave to File Petition for Writ of Mandamus and Petition for Writ of Mandamus in the Fourteenth Court of Appeals in Houston, Judge Wood withdrew her order and entered a new order dated April 22, 1992. This new order requires that Keene, among other things, produce documents pertaining to its March 6, 1992 advertisement. See Exhibit "C". Clearly, these orders do not amount to a prior restraint, nor do they restrict Keene's exercise of free speech. However, they do constitute an impermissible inquiry into the motives and mental processes behind Keene's exercise of free speech and demonstrates [sic] the certainty for repetition of this issue. Absent intervention by this Court, Keene fully expects to be required to initiate mandamus proceedings in order to protect itself from further Court interference with its First Amendment Rights.

VI.

Orders restricting Keene's right to publish advertisements pertaining to asbestos-related litigation will be repeated. Further, due to the short-term nature of such orders, an individual order infringing upon Keene's First Amendment Rights will probably expire before review by this Court is possible. Therefore, Relator respectfully requests that according to the principles set forth in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 546 (1976), that this Court grant its Motion for Leave to File Petition for Writ of Mandamus and consider the issues presented in its Petition for Writ of Mandamus.

Respectfully Submitted,

ROBERTS, MARKEL, FOLGER & POWERS

JAMES H. POWERS
Texas State Bar No. 16217400
KENNETH C. BAKER
Texas State Bar No. 01584480
Weslayan Tower, Suite 1010
24 Greenway Plaza
Houston, Texas 77046
(713) 840-1666

ATTORNEYS FOR RELATOR

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing instrument has been forwarded to counsel of record by certified mail, return receipt requested, Lawyer's Filing Service and/or regular mail on _____ day of _____, 1992.

EXHIBITS

Exhibit A— Current listing of Keene's trial settings in Harris County involving Mr. Williams

Exhibit B— Order dated April 8, 1992

Exhibit C— Order dated April 22, 1992

4/29/92

EXHIBIT A

PLAINTIFF	COUNTY	DOCKET NO.	TRIAL DATE
GADUS, JOSEPH	HARRIS	87-61045	12/09/91
HUHS, OSCAR	HARRIS	87-31603	12/09/91
HUMPHREY, LINDSEY	HARRIS	85-44380	12/09/91
KING, ARTHUR	HARRIS	85-60297	12/09/91
MCCAFFETY, GEORGE	HARRIS	87-34982	12/09/91
MCVAY, WILLIAM	HARRIS	87-51955	12/09/91
HRAZ, JULIUS	HARRIS	86-04693	12/09/91
ROUNTREE, EDGAR	HARRIS	86-15983	12/09/91
SHERRILL, HORACE	HARRIS	87-19969	12/09/91
TULLAR, GARLAND	HARRIS	85-68820	12/09/91
VACHULE, CHARLES	HARRIS	87-13298	12/09/91
CARR, CURLEY	HARRIS	87-42872	1/13/92
COX, BEN	HARRIS	85-34559	1/13/92
FOSTER, RICHARD	HARRIS	89-53870	1/13/92
FROLICK, MILTON	HARRIS	85-65539	1/13/92
GOODSON, DEWEY	HARRIS	90-52152	1/13/92
ICKES, SAMUEL	HARRIS	88-03524	1/13/92
KRAUS, WILMER	HARRIS	85-44884	1/13/92
MCCALLUM, MAURICE	HARRIS	90-24254	1/13/92
MICHALSKY, DANIEL	HARRIS	90-04960	1/13/92
SABATIER, CHARLES	HARRIS	85-50165	1/13/92
SCHULTZE, EUGENE	HARRIS	89-09839	1/13/92
SIEMSEN, HUBERT	HARRIS	89-43356	1/13/92
SOWELL, RAYMOND	HARRIS	89-34694	1/13/92
STEPHENS, GENE	HARRIS	88-12821	1/13/92
THIBODEAUX, HENRY	HARRIS	90-52136	1/13/92
TOMPKINS, JACK	HARRIS	86-15977	1/13/92
WISNOSKI, JOHN	HARRIS	89-26762	1/13/92
BRYANT, JOHN P. JR.	HARRIS	86-04196	1/20/92
BUCK, RICHARD A., JR.	HARRIS	86-16053	1/20/92
GARCIA, MANUEL P.	HARRIS	86-16145	1/20/92
GARZA, RAMON	HARRIS	86-16026	1/20/92
JACKSON, MACK C.	HARRIS	87-09781	1/20/92
JIMENEZ, SYLVESTER	HARRIS	85-39421	1/20/92
LEE, EARNEST JR. A.	HARRIS	87-36041	1/20/92
LEOS, JOE	HARRIS	85-34558	1/20/92
MAY, EDWIN C.	HARRIS	85-44375	1/20/92
MIRE, LARRY J.	HARRIS	86-04695	1/20/92
OGLE, JAMES W.	HARRIS	86-28018	1/20/92

4/29/92 EXHIBIT A

PLAINTIFF	COUNTY	DOCKET NO.	TRIAL DATE
ORSAK, ERNEST	HARRIS	85-44379	1/20/92
SALINAS, LUCIANO	HARRIS	86-16079	1/20/92
SINGLETON, CHARLES L.	HARRIS	86-04188	1/20/92
SKILLMAN, GERALD	HARRIS	85-68821	1/20/92
SPAMPINATO, SAM	HARRIS	87-34980	1/20/92
TOWNSEND, CARL A.	HARRIS	86-60035	1/20/92
WHEELER, CHARLES E.	HARRIS	86-05731	1/20/92
GARCIA, BENNIE	HARRIS	89-26973	2/17/92
BOLTON, ROBERT	HARRIS	89-36514	2/24/92
WILKIE, JAMES B.	HARRIS	89-35726	2/26/92
ANDERSON, WILLIE M.	HARRIS	90-19431	3/02/92
BRAMEL, PAUL D.	HARRIS	89-24849	3/02/92
CLARY, JOE W.	HARRIS	89-54145	3/02/92
DELEON, JUAN A.	HARRIS	88-57430	3/02/92
DRAYTON, WILLIE	HARRIS	90-52139	3/02/92
FLETCHER, JEFF SR.	HARRIS	91-25396	3/02/92
FOSTER, TALMAGE JR.	HARRIS	89-55150	3/02/92
FOWLER, RAY D.	HARRIS	88-60024	3/02/92
HUSTON, ROBERT M.	HARRIS	91-04683	3/02/92
JOHNSON, MCELVIN	HARRIS	89-18671	3/02/92
JOHNSON, RUSSELL	HARRIS	89-43369	3/02/92
MENDOZA, PAUL S.	HARRIS	88-57050	3/02/92
MONTOYA, POLICARPIO M.	HARRIS	90-30277	3/02/92
NICHOLS, DAVID E.	HARRIS	91-12212	3/02/92
NORWOOD, ROBERT A.	HARRIS	89-26793	3/02/92
SAMUEL, JOHNNIE	HARRIS	91-19336	3/02/92
SIMS, LEONARD	HARRIS	88-60082	3/02/92
VINCENT, CLARENCE	HARRIS	90-25239	3/02/92
ALFRED, ANDRIA	HARRIS	89-53998	3/16/92
ALLEE, WILLIAM F.	HARRIS	90-63362	3/16/92
ARYES, RAY	HARRIS	89-23671	3/16/92
BABIN, EVAN R.	HARRIS	88-11401	3/16/92
BATTARBEE, FLOYD A.	HARRIS	90-52156	3/16/92
BLEVINS, JIMMY R.	HARRIS	85-50166	3/16/92
BOHANNON, PAUL D.	HARRIS	89-26960	3/16/92
BRYANT, WILLIAM	HARRIS	85-18515	3/16/92
BURKHALTER, GRADY R.	HARRIS	90-27876	3/16/92
BUTSCHEK, GILBERT P.	HARRIS	90-17737	3/16/92

4/29/92

EXHIBIT A

PLAINTIFF	COUNTY	DOCKET NO.	TRIAL DATE
CARTER, ALBERT E.	HARRIS	87-61047	3/16/92
CLAY, CLEVELAND	HARRIS	89-54365	3/16/92
CREED, JOHN R.	HARRIS	85-18511	3/16/92
CROW, LYNN L.	HARRIS	86-10543	3/16/92
DAVIS, GRANT SR.	HARRIS	85-18514	3/16/92
DAVIS, URBAN	HARRIS	85-18227	3/16/92
DUFFEY, ARCHIE W.	HARRIS	91-11027	3/16/92
FEIGLER, WILL E.	HARRIS	85-39417	3/16/92
GREGORY, CHARLIE R.	HARRIS	85-18233	3/16/92
GRUBBS, JAMES F.	HARRIS	85-34562	3/16/92
GUICHET, JULES J. JR.	HARRIS	90-52154	3/16/92
HELLER, LOUIS W.	HARRIS	86-50434	3/16/92
HOLCOMB, JUNE L.	HARRIS	91-25376	3/16/92
KENNEDY, GEORGE T.	HARRIS	90-04995	3/16/92
KNOWLES, JOE M.	HARRIS	85-68819	3/16/92
LEJSAL, JOHN	HARRIS	87-09784	3/16/92
MATHISEN, EARNEST J.	HARRIS	91-23594	3/16/92
MICHAELS, LEE R.	HARRIS	87-34983	3/16/92
MORTON, GRADY D.	HARRIS	85-50169	3/16/92
MOUTON, JAMES J.	HARRIS	84-69709	3/16/92
PERRY, EMMETT N.	HARRIS	87-57975	3/16/92
PLATT, MARION E.	HARRIS	87-09790	3/16/92
RADICKE, HAROLD E.	HARRIS	90-63375	3/16/92
RANEY, IRA JR.	HARRIS	91-02736	3/16/92
REEVES, DAN	HARRIS	90-63374	3/16/92
SCHISSER, ANTON F.	HARRIS	85-18236	3/16/92
SCOTT, ROBERT D.	HARRIS	85-18232	3/16/92
STEVENS, JOHN B.	HARRIS	85-46937	3/16/92
STONE, DON D.	HARRIS	89-19568	3/16/92
TERRY, MERVYN D.	HARRIS	86-60034	3/16/92
TUCKER, GEORGE	HARRIS	87-34142	3/16/92
WHEELER, WILLIAM L.	HARRIS	85-34531	3/16/92
WILLIAMS, BENJAMIN C.	HARRIS	85-50168	3/16/92
WILLIAMS, JACK B.(JM ONLY)	HARRIS	85-65520	3/16/92
WILLIAMS, WILLARD N.	HARRIS	85-18234	3/16/92
WILLIS, HENRY C.	HARRIS	88-00037	3/16/92
ALLOY, ADOLPH A.	HARRIS	89-011265	4/06/92
BUTLER, JAMES F., JR.	HARRIS	89-23668	4/06/92

4/29/92

EXHIBIT A

PLAINTIFF	COUNTY	DOCKET NO.	TRIAL DATE
CHARLES, EASTON E.	HARRIS	88-16200	4/06/92
COLVIN, GEORGE R.	HARRIS	91-02280	4/06/92
COOPER, MARVIN	HARRIS	90-52169	4/06/92
DILL, LEON M.	HARRIS	86-004201	4/06/92
REICHERT, WILLIE A.	HARRIS	88-56479	4/06/92
SALINAS, FELIPE	HARRIS	89-32273	4/06/92
SHOCKEY, JOHN D.	HARRIS	90-17736	4/06/92
SILLS, ROBERT	HARRIS	89-44769	4/06/92
SONNIER, JUNEIR	HARRIS	85-068827	4/06/92
THIBODEAUX, LILIRS	HARRIS	90-63373	4/06/92
VERA, ROLANDO	HARRIS	90-53566	4/06/92
WALLACE, CLINTEL	HARRIS	88-30495	4/06/92
WALLS, A.B.	HARRIS	87-058193	4/06/92
WILLIAMS, WARREN K.	HARRIS	90-63414	4/06/92
ANDERSON, JAMES	HARRIS	87-51960	4/20/92
BATES, AUBREY H.	HARRIS	88-01922	4/20/92
BLAIR, JAMES E.	HARRIS	88-01916	4/20/92
BOOKER, JOSEPH J.	HARRIS	88-14375	4/20/92
CONTRERAS, RAFAEL	HARRIS	88-01427	4/20/92
EVERETT, ARTHUR F.	HARRIS	88-53458	4/20/92
FOSTER, JAMES	HARRIS	88-16004	4/20/92
FULCHER, WILLIAMS	HARRIS	88-24018	4/20/92
HOWARD, JESSE M.	HARRIS	88-17991	4/20/92
MERRITT, MAXWELL K.	HARRIS	88-54685	4/20/92
POPE, MANDLE	HARRIS	88-31549	4/20/92
RAMEY, LAVADA E.	HARRIS	88-19608	4/20/92
REAGAN, GUY D.	HARRIS	88-63695	4/20/92
ROBERTSON, GARNER W.	HARRIS	88-11361	4/20/92
SANCHEZ, JUAN	HARRIS	88-35892	4/20/92
STAVELY, THOMAS	HARRIS	87-61232	4/20/92
WARREN, ELROY	HARRIS	88-10740	4/20/92
ALLEE, WILLIAM	HARRIS	90-63362	4/27/92
ALLEE, WILLIAM F.	HARRIS	90-63362	4/27/92
BABINEAUX, AVERY J.	HARRIS	90-62281	4/27/92
BAIN, EARL G.	HARRIS	91-17165	4/27/92
BOZARTH, AUBREY E.	HARRIS	89-34684	4/27/92
BROWNSON, JAMES SR.	HARRIS	88-57425	4/27/92
EVANS, SHELTON	HARRIS	90-54821	4/27/92
GALLION, GATHER	HARRIS	88-27998	4/27/92

4/29/92

EXHIBIT A

PLAINTIFF	COUNTY	DOCKET NO.	TRIAL DATE
GILBERT, REX	HARRIS	88-60025	4/27/92
GOFF, LIMON	HARRIS	88-14376	4/27/92
HEARRON, JOHN H.	HARRIS	85-50179	4/27/92
HICKMAN, LINARD V.	HARRIS	90-66576	4/27/92
HICKS, LEO III	HARRIS	88-60405	4/27/92
HIGGINS, RICHARD	HARRIS	88-32799	4/27/92
LEBLOW, JOHN W.	HARRIS	88-11346	4/27/92
MCLAUGHLIN, PAT SR.	HARRIS	88-35895	4/27/92
MECHELL, LESTER S.	HARRIS	88-54439	4/27/92
REDDING, ROSCOE	HARRIS	88-55672	4/27/92
SLOVACEK, CALVIN F.	HARRIS	90-52135	4/27/92
STUBBLEFIELD, ERNEST	HARRIS	88-12812	4/27/92
THOMAS, NEBRASKA	HARRIS	88-60195	4/27/92
AYRES, RAY	HARRIS	89-23671	5/04/92
BABIN, EVAN R.	HARRIS	88-11401	5/04/92
BETTANSKI, FRANK	HARRIS	88-49097	5/04/92
COLLIER, BOBBY J.	HARRIS	88-20512	5/04/92
DARNELL, JAMES	HARRIS	89-21931	5/04/92
DE LA VEGA, JESSE	HARRIS	89-34719	5/04/92
GILBREATH, BILLY J.	HARRIS	88-20513	5/04/92
GLENN, JOHNNIE	HARRIS	89-55118	5/04/92
GRAU, NOAN	HARRIS	89-40346	5/04/92
GRIGGS, WILLIE	HARRIS	87-51956	5/04/92
HINEY III, WILLIAM	HARRIS	89-14254	5/04/92
HUBBARD, RUSH R.	HARRIS	89-23700	5/04/92
HUTTO, GARY D.	HARRIS	89-43351	5/04/92
JOHNSON, RAYMOND L.	HARRIS	87-19917	5/04/92
KOEPPEN, WILLIE G.	HARRIS	89-11269	5/04/92
MANNING, GRADY T.	HARRIS	87-46228	5/04/92
MEGISON, JOHN T.	HARRIS	87-19922	5/04/92
NANCE, WILLIAM	HARRIS	88-37051	5/04/92
NELSON, ROBERT	HARRIS	88-34532	5/04/92
NILES, GERALD L.	HARRIS	88-54435	5/04/92
PINSON, ARTHUR E.	HARRIS	87-34986	5/04/92
PLEASENT, SR., EDWARD	HARRIS	89-48857	5/04/92
POWELL, EDDIE	HARRIS	89-52238	5/04/92
ROGERS, MONZEL	HARRIS	88-52001	5/04/92
ROHDE, ELGIN	HARRIS	89-18663	5/04/92
SAWEY, CHARLES	HARRIS	88-30497	5/04/92

4/29/92

EXHIBIT A

PLAINTIFF	COUNTY	DOCKET NO.	TRIAL DATE
SMITH, AUBREY L., SR.	HARRIS	87-50223	5/04/92
TURNER, CLARENCE	HARRIS	88-158991	5/04/92
WILSON, MILTON Y.	HARRIS	90-65141	5/04/92
ALLMAN, NORMA	HARRIS	89-26786	7/06/92
ALLRED, JOSEPH	HARRIS	88-17578	7/06/92
AUZENNE, ALVIN	HARRIS	89-47749	7/06/92
BAILEY, WILLIAM JR.	HARRIS	88-36452	7/06/92
BRAINER, GLOSTER	HARRIS	87-05212	7/06/92
BRAUD, CHARLES	HARRIS	88-03523	7/06/92
BROWN, ALFRED	HARRIS	89-18673	7/06/92
CAMPBELL, JOE (JM ONLY)	HARRIS	85-65535	7/06/92
COOPER, JIMMY W.	HARRIS	85-68824	7/06/92
DAVIS, EARL	HARRIS	89-18596	7/06/92
DORSEY, CLARENCE	HARRIS	88-12702	7/06/92
DOZIER, RAYMOND	HARRIS	89-26977	7/06/92
DUNSON, KARL	HARRIS	90-52140	7/06/92
ELLIS, HOBART	HARRIS	88-11370	7/06/92
FITZGERALD, GEORGE	HARRIS	89-19262	7/06/92
FREEMAN, HENRY	HARRIS	89-26763	7/06/92
GAUTREAUX, EDWARD	HARRIS	87-34974	7/06/92
GOMEZ, OCTAVINO	HARRIS	88-13102	7/06/92
GONSOULIN, RAYMOND	HARRIS	88-00376	7/06/92
GOOD, CARL	HARRIS	88-09783	7/06/92
GRACE, GEORGE	HARRIS	87-09780	7/06/92
GRAY, MONROE	HARRIS	89-22188	7/06/92
HALES, MURL	HARRIS	90-42927	7/06/92
HARLAN, INEZ	HARRIS	89-21950	7/06/92
HECKLER, ALBERT	HARRIS	87-13361	7/06/92
HERMAN, JOHN	HARRIS	88-17992	7/06/92
HIBBARD, MASTIN	HARRIS	89-09161	7/06/92
KAMINSKI, JOHN	HARRIS	90-53553	7/06/92
KENNIE, NATHANIEL	HARRIS	89-28558	7/06/92
KIBBE, UDEEN	HARRIS	90-33911	7/06/92
KIRK, GEORGE	HARRIS	88-01429	7/06/92
KNIGHT, BILLY	HARRIS	88-11345	7/06/92
MARESH, EDWIN	HARRIS	85-54567	7/06/92
MERRITT, ROBERT	HARRIS	88-09397	7/06/92
MORGAN, DARREL	HARRIS	89-54201	7/06/92

4/29/92

EXHIBIT A

PLAINTIFF	COUNTY	DOCKET NO.	TRIAL DATE
MORRATTO, DOROTHY	HARRIS	90-23614	7/06/92
MORRIS, JAMES	HARRIS	85-18508	7/06/92
PAGE, J. W.	HARRIS	90-63364	7/06/92
POTTIER, JAMES	HARRIS	88-60048	7/06/92
REED, JOHN	HARRIS	89-43368	7/06/92
REYNOLDS, CHARLIE	HARRIS	87-61177	7/06/92
RICHARDSON, B.L.	HARRIS	87-61226	7/06/92
RICHARDSON, LESTER	HARRIS	89-26670	7/06/92
RIPORTELLA, PATSY	HARRIS	88-48304	7/06/92
ROWLETT, JOE	HARRIS	89-54222	7/06/92
SANCHEZ, COSME	HARRIS	86-16065	7/06/92
SANTOS, JESSE JR.	HARRIS	86-60030	7/06/92
SEFCIK, ALVIN	HARRIS	90-25241	7/06/92
SETTLE, MARVIN	HARRIS	88-48302	7/06/92
THOMAS, CHARLES JR.	HARRIS	90-54816	7/06/92
THOMPSON, CHARLES	HARRIS	89-23684	7/06/92
TYLER, LLOYD	HARRIS	90-53561	7/06/92
WESTBROOK, WILLIAM	HARRIS	89-24345	7/06/92
WHITFIELD, CLIFFORD	HARRIS	89-09842	7/06/92
WHITLOW, ERNEST (JM ONLY)	HARRIS	85-23739	7/06/92
CAMPBELL, WILEY D.	HARRIS	90-63368	8/03/92
COOPER, EDWARD S.	HARRIS	91-02284	8/03/92
DETTMER, MARVIN E.	HARRIS	90-53556	8/03/92
DODSON, ARTHUR L.	HARRIS	91-01837	8/03/92
MANCHACA, JOE	HARRIS	90-53543	8/03/92
MORRIS, WILLIS	HARRIS	90-52144	8/03/92
DUDLEY, ROBERT B.	HARRIS	90-53557	8/31/92
HILLMAN, WILLARD	HARRIS	90-52130	8/31/92
MILLS, EDWARD S.	HARRIS	91-01839	8/31/92
MOORE, EDWIN B.	HARRIS	90-63366	8/31/92
WALLACE, THURMAN J.	HARRIS	90-44231	8/31/92
WHITAKER, JULIUS C.	HARRIS	90-42832	8/31/92
WILLIAMS, ADOLPHUS	HARRIS	90-43707	8/31/92
BURRELL, JOHNIE L.	HARRIS	91-04656	9/14/92
PRICE, ALTON	HARRIS	91-06667	9/28/92
STRINGFIELD, AVANELL	HARRIS	91-06669	9/28/92
TIBBETS, CHARLIE M.	HARRIS	91-03399	9/28/92
WILDER, LEONARD A.	HARRIS	91-03407	9/28/92

Cause No. 85-44379
(Consolidated for trial)

ERNEST J. ORSAK, ET AL	×	IN THE
	×	DISTRICT COURT OF
v.	×	
	×	HARRIS COUNTY, TEXAS
THE KEENE CORPORATION	×	
	×	127TH JUDICIAL DISTRICT

ORDER

On March 6, 1992, the Court conducted a hearing concerning the verdict in this consolidated trial. Based on the representations concerning the placement by THE KEENE CORPORATION of the advertisement of March 5, 1992, it is therefore

ORDERED, ADJUDGED AND DECREED that Keene Corporation shall produce for the Court's inspection all documents, correspondence, in-house memos, drafts and correspondence concerning KEENE'S advertising campaign in any newspaper or other print media throughout the United States, particularly including any documentation going to KEENE'S intent in placing the ad which appeared in *The Houston Chronicle* on March 5, 1992, a copy of which is attached as Exhibit "A", and any other documentation showing whether or not the ad was part of a nationwide campaign and whether or not it was "mere coincidence" that the ad appeared during the jury deliberation in this consolidated trial, all as represented by attorney for KEENE.

Counsel for The KEENE CORPORATION was so ordered, in open court.

On March 30, 1992, at a hearing on Plaintiff's request for discovery on the advertisement, all counsel were pres-

ent. Plaintiff's discovery is ORDERED abated at this time due to the Court's prior order to KEENE. The date of April 20, 1992 is set by the Court as the date for the production of the ordered documentation by THE KEENE CORPORATION.

Signed April 8, 1992

/s/ SHAROLYN WOOD
Hon. Sharolyn Wood
Judge Presiding

EXHIBIT B

Legal fees Up, up and away

GLENN W. BAILEY, chairman and president of Keene Corp., isn't the most objective observer of the asbestos lawsuits his company has endured.

But since his company will be shelling out $500 million in legal fees, Bailey does offer a unique insight into America's court system.

In case you missed Bailey's letter to the editor, here is a synopsis: In 1968, Keene bought a small maker of acoustical ceilings, ventilation systems and insulation products for $8 million. Some of that insulation included asbestos. The company ceased production in 1972.

Keene's losses didn't end there. They had just begun. Asbestos led to lawsuits and a whopping $500 million in court awards and legal fees. So far, 12 co-defendants have been bankrupted.

Bailey says he doesn't mind paying injured parties, but the punitive damages and legal fees are absurd. Less than half the $500 million will actually go to anyone injured by asbestos. The rest—60 percent—goes to lawyers.

"A criminal can be punished only once, while a manufacturer might be punished thousands of times for a single act—even though as in our case, we did nothing that was illegal," Bailey wrote.

That's not justice. It's abuse.

Not only does injustice harm the nation's soul, but its economy as well. Vice President Dan Quayle's Council on Competitiveness found that litigation is now a $300 billion drag on the economy.

That's what happens when you have 70 percent of the lawyers in the world.

The above editorial appeared on December 31, 1991 in West Virginia's Charleston Daily Mail *and is reprinted with its permission.*

• • •

"We are encouraged that the facts are getting through concerning a serious problem that affects all Americans."

For further information write to
Keene Corporation
200 Park Avenue, New York, NY 10166

Exhibit "A"

SHAROLYN WOOD
Judge, 127th District Court
Harris County Courthouse
Houston, Texas 77002

April 22, 1992

TO: POWERS, JAMES H.
24 GRNWY PLZ/1010
HOUSTON, TX 77046

COUNSEL:

THE COURT HAS MADE THE FOLLOWING DOCKET SHEET ENTRY:

APRIL 20.1992: ORDER RE 21 DAY PRODUCTION SET ASIDE. DEFENDANT KEENE TO ADVISE THE COURT IN WRITING BY WHAT DAY DEFENDANT KEENE WILL PRODUCE THE DOCUMENTS AS REPRESENTED TO THE COURT ON MARCH 6, 1992. ORDER AND RULING RE PLAINTIFFS DISCOVERY SET ASIDE AND RE DEFENDANTS MOTION FOR PROTECTION SET ASIDE. THE COURT INTENDS TO SET ASIDE THOSE MATTERS CONSIDERED AT THE 3-30-92 HEARING ONLY. DEFENDANT KEENE MAY SET ITS DISCOVERY OBJECTIONS FOR HEARING IF CONTINUES TO URGE SUCH OBJECTIONS. DEFENDANT KEENE WILL ADVISE THE COURT OF THE NAME OF THE ATTORNEY THAT APPEARED FOR MR. POWERS ON 3-30-92. IF THE COURT RECEIVES NO RESPONSE WITHIN 5 DAYS, THE COURT WILL SET A DATE FOR THE DOCUMENTS TO BE PRODUCED THAT SUBSTANTIATE DEFENDANT KEENE'S REPRESENTATIONS TO THE COURT. ORDER SIGNED.

SHAROLYN WOOD,
JUDGE, 127TH DISTRICT COURT

CASE – 8544379 FILED – 080585 COURT – 127
TYPE – DAMAGES (ASBESTOSIS)
ORSAK, ERNEST J VS ACANDS INC.

EXHIBIT C

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 20, 1992

Mr. James H. Powers
Roberts, Markel, Folger
& Powers
Weslayan Tower, Suite 1010
24 Greenway Plaza
Houston, TX 77046

Mr. Kenneth C. Baker
Roberts, Markel, Folger
& Powers
Weslayan Tower, Suite 1010
24 Greenway Plaza
Houston, TX 77046

Mr. John E. Williams, Jr.
Umphrey, Burrow, Williams
& Bailey
8441 Gulf Freeway, Suite 600
Houston, TX 77017-5001

Mr. R. Lyn Stevens
Weller, Wheelus & Green
550 Fannin Street
5th Floor, Petroleum Tower
Beaumont, TX 77704

Ms. Melinda L. Wesner
Umphrey, Burrow, Williams
& Bailey
8441 Gulf Freeway, Suite 600
Houston, TX 77017-5001

RE: Case No. D-2264
Style: KEENE CORPORATION
v. THE HONORABLE TONY LINDSAY, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for rehearing of motion for leave to file petition for writ of mandamus in the above referenced case.

Sincerely,

John T. Adams, Clerk

by /s/ COURTLAND CROCKER
Courtland Crocker, Deputy

cc: Mr. Joe Cox
Honorable Tony Lindsay

REST IN PEACE

16 COMPANIES DRIVEN TO BANKRUPTCY
TENS OF THOUSANDS OF JOBS LOST
OUR ECONOMY BATTERED

ALL CAUSED BY THE ASBESTOS LAWSUIT LOTTERY. A runaway litigation nightmare that has clogged our courts with many frivolous claims by people who are not injured. As a result, deserving claimants and citizens with other cases are delayed or deprived of their day in court.

Asbestos is 90th on the Environmental Protection Agency's list of items that should concern Americans. But asbestos litigation is the number one cause of court-clogging, the number one cause of bankruptcies of otherwise healthy and productive companies and number one in generating lawyers' fees.

$9 billion dollars has been spent in asbestos litigation but less than 35% has reached the plaintiffs, $6 billion dollars has gone to lawyers!

From 1980 to 1990, the U.S. population increased by 23 million while the number of factory jobs decreased by 15%. American prices are being driven up, American jobs are being lost, and American businesses are being forced from the market place and into bankruptcy. American competitiveness has slipped to fifth place. Japan is now number one and Germany is number two!

It must give our foreign competition a lot of comfort to watch the American Justice System cripple American companies as they build theirs!

Congress, the Judiciary and the White House have recognized the need to stop the asbestos lawsuit lottery. Now they must act to solve this serious national problem before even more jobs are lost.

Will your job and your company be next?

LEGISLATION IS NEEDED BEFORE IT'S TOO LATE.

Write to your elected congressional representatives now and urge them to pass an administrative claims process that would resolve the problem that is strangling our courts and our economy.

For more Information write to:
KEENE CORPORATION
200 Park Avenue, New York, NY 10166

Legal fees Up, up and away

GLENN W. BAILEY, chairman and president of Keene Corp., isn't the most objective observer of the asbestos lawsuits his company has endured.

But since his company will be shelling out $500 million in legal fees, Bailey does offer a unique insight into America's court system.

In case you missed Bailey's letter to the editor, here is a synopsis: In 1968, Keene bought a small maker of acoustical ceilings, ventilation systems and insulation products for $8 million. Some of that insulation included asbestos. The company ceased production in 1972.

Keene's losses didn't end there. They had just begun. Asbestos led to lawsuits and a whopping $500 million in court awards and legal fees. So far, 12 co-defendants have been bankrupted.

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Not only does injustice harm the nation's soul, but its economy as well. Vice President Dan Quayle's Council on Competitiveness found that litigation is now a $300 billion drag on the economy.

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• • •

"We are encouraged that the facts are getting through concerning a serious problem that affects all Americans."

For further information write to
Keene Corporation
200 Park Avenue, New York, NY 10166

All Three Branches of GOVERNMENT ARE WORKING TO

SOLVE A MAJOR PROBLEM

THE LEGISLATIVE, JUDICIAL AND EXECUTIVE BRANCHES of our Government are trying to correct a litigation problem that is causing bankruptcies, destroying jobs and clogging our courts. The lawsuit logjam is depriving all of us of our right to be heard promptly. Justice delayed is Justice denied. Especially for meritorious claimants.

Last year the Ad Hoc Committee on Asbestos Litigation appointed by Chief Justice Rehnquist reported that . . . "what has been a frustrating problem is becoming a disaster of major proportions to both the victims and producers of asbestos products, which the courts are ill-equipped to meet effectively."

In March 1991, the Ad Hoc Committee recommended that Congress enact legislation to solve the Nation's asbestos litigation mess.

Both the House and Senate responded. **Congressman William Hughes** of New Jersey, Chairman of the House Judiciary Subcommittee on Intellectual Property and Judicial Administration, began hearings on October 24th. On February 18th of this year **Senator Howell Heflin,** Chairman of the Judicial Subcommittee on Courts and Administrative Practice, also began hearings on this critical situation.

The Executive Branch recognized the problem as shown when **Vice President Quayle** told the American Bar Association last August: "Overuse and abuse of the civil justice system has become a self-inflicted competitive disadvantage." In October, **President Bush** at a White House ceremony noted that rules are being set because the American legal system had "spun out of control."

The Council on Competitiveness has estimated that litigation is now a $300-billion annual drag on the economy. Between 1978 and 1991 sixteen major American-owned defendant companies in asbestos litigation reorganized or liquidated under U.S. bankruptcy laws. Thousands of Americans lost their jobs.

In mid-1990 Keene Corporation had 76,000 personal injury claims pending against it and, although more that 17,000 cases have been settled since then, there are now 87,000 pending! Many of these plaintiffs, who were recruited by trial lawyers, have no health impairment but seek damages because they claim to have been exposed to asbestos.

The cost to date of the lawyer-inspired asbestos litigation is estimated to be $9-billion, with approximately $6-billion going to the lawyers! That equates to enough capital to create over 200,000 jobs, or that sum could have been used to build over 90,000 housing units! Civil justice abuse works against the best interests of society.

If nothing is done to fix the civil justice system the final cost could be astronomical. Pending asbestos cases could cost another $20-billion while the ultimate cost could be $50 to $100-billion.

To prevent the unnecessary bankrupting of companies which have been out of the asbestos business for many years, an interim law is needed until a final bill can be developed that would cover three things:

1. **Eliminate punitive damages, the acknowledged abuse in asbestos litigation.**
2. **Establish a pleural registry for unimpaired plaintiffs who have health concerns so that they could be compensated should they later have health impairment.**
3. **Suspend consolidations of diverse plaintiffs until the fairness issue is resolved.**

☆☆☆☆☆

LEGISLATION IS NEEDED BEFORE IT IS TOO LATE. A start has been made by all three branches of government. Let's keep it rolling.

KEENE CORPORATION
200 Park Avenue, New York, NY 10166

LITIGATION IS CLOGGING OUR COURTS, BANKRUPTING COMPANIES, DESTOYING JOBS

From 1980 to 1990, the U.S. population increased by 23 million while the number of factory jobs decreased by 15 percent. American prices are being driven up, American jobs are being lost, and American businesses are being forced from the marketplace and into bankruptcy

☆

WE NEED LEGISLATION NOW TO SOLVE THIS CRISIS

☆

WHY? One major reason, as Vice President Quayle stated in August before the American Bar Association: "Overuse and abuse of the civil justice system has become a self-inflicted competitive disadvantage."

Based on my own experience as chairman of the board of Keene Corporation, I heartily agree.

Currently, I am spending 99 percent of my time on litigation and 1 percent toward growing Keene's manufacturing subsidiary. If I could spend most of my time developing that operation, by the end of the decade Keene could have sales of $500 million per year and create 4,000 new jobs.

Some lawyers have said that they are concerned with the future of Keene merely insofar as their clients are concerned, implying that 4,000 jobs are not of concern to them. How can we compete in world markets having to spend management time fighting lawyers with attitudes like this, especially in view of America's increasingly painful unemployment situation?

Let me explain how Keene got into this litigation. In 1968, Keene bought, for $8 million, a small manufacturer of insulation products. Some of these products were required, by customers' specifications, to contain asbestos. Keene stopped making these products in 1972 and closed the company down in 1976, losing Keene's entire investment.

End of tale? Not at all! Laws developed in the late 1970s, strengthened in the '80s, and applied in the '90s to the events of the '40s, '50s and '60s have caused Keene and its insurers to spend $350 million on asbestos litigation.

Keene is willing to spend another $150 million in the future, approximately 80 percent of its net worth. That's a half-billion dollars lost for the mistake of acquiring a company for $8 million . . . and lawyers consume over 60 percent of those dollars!

A CRISIS EXISTS. Defendant firms are being bankrupted, thereby creating two severe problems: 1) more American workers will lose their jobs; 2) there will not be money available for future plaintiffs with meritorious claims. One-half of our co-defendant firms have been bankrupted, and a contributing factor has been the growing punitive damage awards. A criminal is punishable only once, whereas a manufacturer might be punished thousands of times—even though, as in our case, nothing was done that was or is illegal!

Punitive damages demanded by lawyers and awarded against Keene in five jurisdictions this year have amounted

to $26 million. All are under appeal, as none of them is justifiable. Elimination of punitive damages would release $26 million, yielding $26,000 each for 1,000 widows in the future.

So far in 1991, Keene has spent $10 million to defend itself in frivolous suits—suits which Keene won. If Vice President Quayle's proposed rule to have the loser pay the other party's legal expenses were instituted, such suits would be dramatically reduced and unclog the courts.

Many Members of Congress are aware of the severity of the litigation problems, and, in fact, eight Members participated in a hearing conducted by Congressman William Hughes of New Jersey. This hearing was on October 24th, the day following the White House ceremony at which President Bush noted that rules are being set because the American legal system had "spun out of control."

My concern is not just about Keene, but about the serious economic decline of America. I am urging that you write to your Members of Congress and urge them to examine the facts that have been established and enact legislation to solve the absestos litigation problem that is overwhelming our judicial system and hurting our economy.

/s/GLENN W. BAILEY
Glenn W. Bailey
Chairman and President
KEENE CORPORATION
200 Park Avenue, New York, NY 10166
212/557-1900

"Overuse and abuse of the civil justice system has become a self-inflicted competitive disadvantage."

VICE PRESIDENT QUAYLE, addressing
the American Bar Association.

KEENE CORPORATION
200 Park Avenue, New York, NY 10166
212-557-1900 FAX 212-972-3959
FAX 212-697-5289

August 22, 1991

Mr. John J. Curtin, Jr., President
American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611

Dear Mr. Curtin.

In rebutting Vice President Quayle's remarks to your Association, you said: "In our view, the civil justice system and the lawyers who work in it are not the source of America's failure to compete effectively with foreign countries." Your statement stimulated me to write this letter about my company's experience during the week of the ABA meeting.

On Monday, August 12, Fred Baron, a lawyer for the asbestos plaintiffs in Texas and other states, persuaded Judge John McClellan Marshall of the 14th District Court in Dallas to sign an order requiring Keene to turn over $4 million in cash and confidential corporate documents. Baron did this via unsupported allegations and numerous inaccurate statements, and Keene never had a chance to point out to the Judge that Baron had made many false statements. Baron simply presented his pleadings on a

special calendar and stripped away Keene's rights to a fair hearing. Keene is a publicly held company and many of Baron's false allegations are easily refuted by its financial statements that are available to everyone. Keene is appealing that order.

On Thursday, August 18, Baron had me involved in a deposition and was constantly probing for confidential information, such as the names of creditors and bank accounts, indicating that he would like to force Keene into bankruptcy. Why does Baron want to bankrupt Keene? Because Keene won't give up and pay him whatever he demands if he doesn't accept the settlement guidelines Keene developed to provide money for the plaintiffs with severe impairment, both present and future. Baron's behavior says to me that he wants all of Keene's money *now* for his clients and for himself, at the expense of future plaintiffs.

During the deposition I mentioned that I was spending 99% of my time on litigation and 1% toward growing Keene's composite manufacturing subsidiary. If I could spend most of my time developing that operation, by the end of the decade Keene could have sales of $500 million per year and create 4,000 new jobs. Baron indicated he was concerned with the future of Keene merely insofar as his clients were concerned, implying that 4,000 new jobs were not of a concern to him. How can we hope to compete in the world markets with this lawyer's attitude, especially in view of America's painful unemployment situation?

Keene bought, for $8 million in 1968, a small manufacturer of insulation products. Some of them were required by customers' specifications to contain asbestos. Keene stopped production of these products in 1972, and closed

the company down in 1976—losing Keene's entire investment. End of tale? Not at all! Laws developed in the late 1970s, strengthened in the '80s and applied in the '90s to the events of the '40s, '50s and '60s have caused Keene and its insurers to spend $350 million on asbestos litigation. Keene is willing to spend another $150 million in the future, approximately 80% of its net worth. That's a half-billion dollars lost for the mistake of acquiring a company for $8 million. . . . and lawyers will consume over 60% of those dollars!

Keene has spent $10 million so far in 1991 to defend itself in frivolous suits which Keene won. If the proposed rule that the loser pays the other party's legal expenses were instituted, these suits would be dramatically reduced and unclog the courts.

Punitive damages demanded by lawyers and awarded against Keene in five jurisdictions this year have amounted to $26 million. All are under appeal, as none of them are justifiable. Elimination of punitive damages would release $26 million, yielding $26,000 each for 1,000 widows in the future.

Mr. Curtin, please rethink your statement about lawyers not being one of the sources of America's failure to be competitive. Keene's experience shows that American prices are being driven up and American businesses are being forced from the marketplace and into bankruptcy by the non-professional, self-aggrandizing and personal greed of a number of American lawyers.

Sincerely,

/s/ GLENN W. BAILEY
Glenn W. Bailey
Chairman and President

THE WALL STREET JOURNAL WEDNESDAY, JULY 15, 1992

Rule of Law — by Glenn W. Bailey

Litigation Abuse Is Destroying My Company

As the Democrats meet in New York this week, they claim to be worried about the erosion of American Industry. As an American industrialist, I can tell them that one of the prime causes of our trouble is entirely within the control of the political process: abusive litigation. If they're serious about repairing our industrial base, reining in the litigation monster is the place to start.

Twenty-five years ago, when I started Keene Corp., the company was worth $800,000. Keene, a former Fortune 500 company, is now spending $800,000 each week on asbestos-related litigation. On Monday, we were one of six defendants found liable by a Baltimore jury in a huge, non-consensual, consolidated asbestos trial, a trial that involved 8,500 plaintiffs. And there is plenty more asbestos litigation to come for us.

Why? Because out of the 50 acquisitions Keene made, one, a company called Baldwin Ehret Hill, bought in 1968 for $8 million, made thermal insulation that contained about 10% asbestos. From 1968 to 1972, Baldwin Ehret Hill sold $15 million worth of asbestos-containing products out of total sales of more than $500 million. In 1972 Keene had its affiliate totally eliminate asbestos and in 1975 the affiliate was closed.

Since then, Keene has paid out $400 million to resolve asbestos claims brought against it because of its unprofitable $8 million investment 24 years ago. Two-thirds, or approximately $265 million, has gone to lawyers. Four of

the plaintiff law firms have received fees exceeding Keene's original $8 million investment.

Not one of the plaintiffs was ever employed by Keene or the company it bought. In fact, most of them worked in Navy shipyards during World War II, 25 years before Keene was formed. And here's the greatest irony: Most of these plaintiffs are not sick. They're just worried about what might happen in the future.

In asbestos litigation, courts are focusing on suppliers like Keene even though Keene did nothing illegal or improper. In response to the medical research of the time, Keene's cartons bore caution labels about how to handle its products.

Suppliers like Keene are being sued, not because they did anything wrong, not even because they were directly responsible for any harm done, but because lawyers don't make much in fees from suing the plaintiffs' actual employers. The employers are covered by workers' compensation programs. Nor do courts generally allow consideration of the plaintiff's responsibility or his employer's safety practices to mitigate judgments against a supplier.

Nowhere else in the world could these lawsuits be successfully brought against a company like Keene. No other country countenances a justice system anything like the U.S.'s ad hoc asbestos law, with its punitive damages, consolidation of entirely diverse cases, junk-science testimony and huge contingency fees.

However, here in the U.S., because of this abusive litigation, 16 of our co-defendants have been bankrupted. Since they are no longer in the courtroom, the rest of us must shoulder their burden, in addition to our own. Under the "joint and several responsibility" rule, the last

asbestos supplier standing will be liable for all the judgments against all asbestos defendants. And the elimination of the remaining suppliers should come soon, as we face 2,000 new lawsuits each month.

Contingency fees provide some of these lawyers returns of well over $5,000 a hour, encouraging them to recruit even more plaintiffs. Result? A clogging of the courts and a wasting of funds.

The public panic has become so great that although asbestos ranks 90th on the Environmental Protection Agency's "Priority List of Hazardous Substances," asbestos litigation is the No. 1 cause of health and safety litigation. It's No. 1 in the number of claimants, No. 1 in the number of defendant bankruptcies and No. 1 in the size of lawyers' fees.

It's time to reconsider what we are doing. Litigation is the most ineffective way to get money to claimants. In asbestos-related litigation, less than 35% of the award typically gets to the plaintiff.

How have the plaintiffs' lawyers accomplished this? An ad hoc "asbestos law" was developed in the 1970s and strengthened in the '80s. Now it is being applied in the '90s to the events of the 1940s, '50s and '60s.

The single most wasteful example of asbestos panic can perhaps be seen in the zeal to remove asbestos-containing insulation from buildings. *Driving to* an asbestos-insulated building is 1,600 times more dangerous than breathing the air *in* the building. Smoking is 22,000 times as dangerous. The Environmental Protection Agency, the American Medical Association and the Health Effects Institute all say it is safer to leave existing asbestos insulation in place than to remove it.

But lawyers slavering for more and more fees exploit the American public's fears to press America's businesses to pay for the unnecessary removal of asbestos insulation from all buildings. And some judges under the special "asbestos law" will not even allow a relative risk comparison to be argued in the defendant's case.

The current civil-justice system wasn't designed to handle the multitude of asbestos claimants. An alternative system of claims resolution is required. An administrative alternative would be a more efficient solution for all present and future meritorious claimants. It should also put a cap on punitive damage awards, discourage frivolous lawsuits, limit lawyers' contingency fees and rule out "junk-science" experts. Such a solution has been proposed to Congress.

Asbestos litigation, which is just the leading edge of the "legalized extortion" epidemic, has cost American firms approximately $9 billion—with about $6 billion of the total going to lawyers. That's enough money to support more than 200,000 jobs or to build 90,000 housing units.

If nothing is done to fix the abuse and overuse of the civil-justice system, asbestos-type legalized extortion will spread to other industries. Now is the time for action to save America's industrial strength. Is anyone in Washington listening?

Mr. Bailey is chairman of Keene Corp. in New York.

TAMING THE ASBESTOS LITIGATION MONSTER

Remarks to the Judges Panel
On Asbestos Litigation

By Glenn W. Bailey
Chairman and President
Keene Corporation

Seminar Sponsored by
Andrews Communications

May 21, 1992 Philadelphia

Keene Corporation is a small company fighting to survive the "asbestos litigation mess" that has bankrupted 16 major companies so far. Keene acquired a small company in 1968 for $8 million and operated it for only four years. A few of that company's insulation products included small amounts of asbestos to meet customers' specifications. Yet, Keene has offered to pay out a total of $500 million to put asbestos litigation behind it. Mr. Bailey's comments follow:

I've been invited to speak to you today because my efforts to resolve the asbestos litigation problem have excited deep feelings among some judges and certainly most plaintiff lawyers. My detractors have called me cranky, irrational, impolitic, irate—and many other names not as acceptable in polite society.

But the issues at stake here are larger than individual personalities. This litigation has spiraled out of control and is harming our country's economy and our civil justice system.

I have come here to share my thoughts with you with the hope that these thoughts might move us all along the road toward a resolution of this difficult situation. We have something in common. Keene wants what I think the state and federal judges around the country want: to clear all court dockets of all asbestos cases efficiently and promptly. My hope is that by explaining where Keene is coming from, we can work together with judges to achieve this important national goal.

I've already had the opportunity to meet with some of you personally, and to express my views of where we are, how we got here and where we need to go.

But today, the emphasis will be mainly on the last point—where we need to go—because time is running out. If the present situation persists, seminars like this won't be necessary or even possible. No companies will be left to compensate people who get sick from exposure to asbestos. So let's use this opportunity well.

Let me begin with a few points of background and history because we cannot deal effectively with the present unless we understand the past.

Point 1. It is undisputed that, when properly handled, asbestos-containing products are safe and of great social utility.

As some of you may know, as late as 1979, the U.S. Navy still maintained that it was impossible to build efficient naval vessels without asbestos. Asbestos is and will continue to be used in hundreds of products in the future.

However, while asbestos is number 90 on the EPA's list of items that should concern people, asbestos *litigation* is:

- Number one as a cause of court clogging
- Number one in number of claimants
- Number one in causing bankruptcies of otherwise healthy and productive companies, and
- Number one in generating lawyers' fees

Point 2. The existing format for processing asbestos claims—namely through the tort system—is the most inefficient way to get money to claimants.

Even the much criticized Social Security system gets 98% of the funds to the intended recipient. But in asbestos litigation less than 35% of the funds go to the plaintiff. And because a system has evolved which establishes different legal standards for asbestos claimants—making it easier for unimpaired claimants to obtain grossly inflated damage awards—an even smaller fraction of the available funds is delivered to the truly impaired plaintiffs.

Point 3. The present system—and all of its problems—is self-perpetuating. It has a life of its own.

Judges' efforts to resolve cases all too often have resulted in a perverse incentive, causing more cases and more backlog.

This is what happens: the opportunity for contingent fees that yield some lawyers returns of well over $5,000 per hour drive them to recruit more plaintiffs, most of whom are not sick. When cases are settled, these lawyers recruit still more plaintiffs and file still more cases resulting in still more serious docket clogging and the further depletion of funds needed for truly impaired plaintiffs in the future.

Let's look at this a little more closely and I will use as the example my company—Keene Corporation—and its now defunct subsidiary Baldwin-Ehret-Hill, or BEH. BEH

actually manufactured the asbestos insulation products at issue in this litigation. Keene bought BEH in 1968 and by 1972, BEH no longer manufactured asbestos products. It was shut down completely by 1975.

Now, today's trials do not deal with whether the plaintiff's injury was caused by Keene's BEH subsidiary, or whether BEH appropriately warned of the dangers of improperly handling its products when medical research evidence became available.

Today's trials do two things:

- They limit the plaintiffs' responsibility for ignoring warnings, and

- They limit their employer's responsibility for not providing a safe workplace and enforcing the company's then-existing requirement to wear respirators in areas where dust could not be controlled by the use of ventilation and dust collection equipment.

Today's trials focus solely on the supplier.

Today's trials also permit the introduction of irrelevant and inflammatory evidence, resulting in verdicts not related to the extent of the plaintiffs' injury, but to the heat of the lawyers [sic] rhetoric.

This combination (a) of limiting the responsibility of the plaintiff and his employer, (b) of focusing all the liability on the ever shrinking number of suppliers, and (c) of permitting irrelevant and inflammatory evidence, inevitably lead to more cases and more trials.

Point 4. Today's trials yield unpredictable, inequitable and arbitrary results.

Judge Weinstein and many others have noted that juries, confronted with essentially the same facts, have awarded damages ranging from zero to millions of dollars!

This "asbestos lottery" and its attendant high contingency fee payments have motivated plaintiff lawyers to recruit increasing numbers of unimpaired claimants to perpetuate their fee-feeding frenzy.

In some jurisdictions, Keene has been "gagged" from commenting on matters of public concern and presenting historical facts while judges and lawyers have publicly aired opinions, frequently prejudicial to Keene.

Point 5. Since the bankruptcy of Johns-Manville and other major suppliers, plaintiff's law firms have scrambled to retool their practice and target smaller companies like BEH.

The burden of larger and larger "lottery" type awards now falls on fewer and fewer companies with less and less money. Example: in a current case, with 8,555 plaintiffs, approximately 85% of the 100 plus original defendants are not in the courtroom. And furthermore, though BEH had less than a few percent of the market and never mined or milled asbestos, Keene now has 87,000 cases pending against it.

Point 6. The asbestos litigation has cost the American economy $9 billion so far, with about $6 billion going to lawyers.

What is the underlying significance of these numbers? Those billions could have been used to invest in and create over 200,000 jobs or 90,000 housing units. Some estimate that continued uncontrolled asbestos litigation costs could exceed $100 billion or the equivalent of 2 million jobs or a million housing units!

Point 7. The asbestos litigation frenzy continues to expand.

Contrary to the advice of the EPA, the American Medical Association and the Health Effects Institute, people

are needlessly removing asbestos-containing insulation from buildings and suing. Comparing recent statistics, we learn that driving to a building containing asbestos insulation is 1,600 times more dangerous than breathing air in the building. Further, smoking is 22,000 times more dangerous than breathing air in a building containing asbestos insulation.

So, where has all this left us? The Ad Hoc Committee of Judges calls it an impending disaster. We could never have devised a system on purpose that would better guarantee hundreds of thousands of lawsuits, over 90% of which have been brought by people who aren't sick. Forbes magazine reported that up to 80% of cases pending a year ago involved those who are not sick. The data at Keene, and I'm sure at other companies, are that the number is much higher in new filings.

What Comes Next

And, where are we going? Well, that is up to you, the judges who have the responsibility for asbestos cases around the country.

If the goal is to run the litigation until every defendant has been bankrupted, thousands of people left uncompensated, and thousands of workers without jobs, then continue to do what is now being done. On the other hand, if your goal is to do justice to the parties and to the public—and I believe it is—the path is clear.

We need a system—uniform all over the United States—which will do four things:

1. Provide fair compensation to truly impaired plaintiffs promptly.

2. Stop new case filings.

3. Control transactional costs—mainly lawyers' fees, both plaintiff and defendant.

4. Keep defendants in business to provide compensation for future meritorious claimants.

Solutions

Now, how do we get there? There are three sure ways:

1. We must make sure that the money gets only to sick people.

The best way to ensure that is by the establishment of court-mandated "pleural registries" or some similar non-trial track docket.

By simply establishing a Pleural Registry and ordering cases to it, judges could make the trial track litigation more manageable and unclog court dockets overnight.

A pleural registry would take the cases of all claimants who do not have any asbestos-associated impairment off the court's active docket and suspend the statute of limitations until the plaintiff becomes impaired.

Only then would he have the right to return to court and have his case processed. It's already being done in some places, but to accomplish the previous goals of distributing money fairly, stopping new court filings, containing transactional costs and keeping present defendants in business, pleural registries must be implemented everywhere. Otherwise, there simply isn't enough money to pay these claims nor enough courts to process them.

2. We must stop punitive damages.

Historically, punitive damages have been imposed on defendants as punishment for intentionally causing harm and as a deterrent to bad conduct. All punitive damage awards punish, but in these asbestos cases they don't act as a deterrent. Why? Because these products haven't been made in decades, and no harm was intentionally caused—at least not by Keene. What else can further awards of punitive damages deter?

As for punishment, Keene spent $8 million to buy BEH in 1968 and has spent $400 million on this litigation. It has been punished plenty! And, Keene has been punished despite the fact that in our landmark insurance coverage case, Keene made billions of dollars available to compensate sick claimants.

Sixteen bankruptcies are enough. The loss of tens of thousands of jobs is enough. Awards of hundreds of millions in punitive damage dollars are enough. In fact, 25% of all punitive damage awards since 1965 were in asbestos cases. Enough!

But perhaps even more importantly, punitive awards are windfalls for a few and will deprive compensation to present and future meritorious claimants. There simply isn't enough money!

3. We must stop consolidations.

Consolidation of cases is used increasingly by some trial judges to force settlements and to control their dockets. This device actually is counter-productive. And it has resulted in a significant increase in the rate of new asbestos claims filed. Why?

Well, as Judge William Butler of the Federal District Court for the Southern District of Alabama recognized in his *Cain* opinion, large consolidations make it impossible for a defendant to get a fair trial, resulting in inflated jury verdicts, which in turn create more incentive to file more cases. When he granted a new trial in the *Cain* opinion, he wrote:

"*The congestion these cases caused in this district for all civil litigants gives one a skewed view of how to resolve the problem. The 'try as many as you can at one time' approach is great if they all, or most, settle: but when they don't—and they didn't here—thirteen shipyard workers, their wives, or executors if they have died, got*

a chance to do something not many other civil litigants can do—overwhelm a jury with evidence. Evidence that would not have been admissible in any single plaintiff's case, had these cases been tried separately. As the evidence unfolded in this case, it became more and more obvious to this court that a process had been unleashed that left the jury the impossible task of being able to carefully sort out and distinguish the facts and law of thirteen plaintiffs' cases that varied greatly in so many critical aspects. In the final analysis, the court is convinced that the defendants did not receive a fair trial."

Not only are consolidations incompatible with doing justice, they encourage the filing of tens of thousands of additional cases.

Now there are also some other factors contributing to perpetuation of the asbestos litigation disaster and more judges could do to help solve it:

■ The continued scheduling of trials for unimpaired plaintiffs with the opportunity for huge verdicts, leads to more filings. There's a great incentive for plaintiffs' attorneys to file new cases in which preparation has become routinized—an easy one-third, or more, fee for little work.

■ You also have court rules or state laws or the inherent power which would allow you to oversee and regulate contingent fees, but other than Judge Shadur in the *Conway* case, I'm not aware of any judge who has used this power. You should rethink this issue and superintend the reasonableness of contingent fees.

Judge Weiner, in the federal Multi-District Litigation, is considering many of the points I have mentioned today and we support his efforts toward a fair and prompt resolution of the federal cases.

But the majority of cases are in the state courts. Unless we stop the flood of filings and verdicts there, the asbestos Monster will keep growing and your dockets will be even more crowded than they are today.

So my earnest plea to you is to stop feeding this Monster before it devours us all. Every judge with asbestos cases on his or her docket should seek sensible solutions:

- To end asbestos litigation
- To preserve the jobs and the viability of defendant companies, and
- To eliminate unnecessary costs that delay and deprive impaired claimants of their recovery

Consolidations, repeated punitive damage awards, easy access to trial and watered-down burdens of proof have been attempted and have failed to achieve these goals. They just don't work.

Where courts do not apply special rules that apply only to asbestos cases ("Asbestos Law") and where they set up pleural registries, court dockets are not clogged and cases go away.

So the solutions are up to you.

Let me end this: just consider that Keene bought BEH in 1968 for $8 million. The company already had warning labels on its products. Keene stopped all production of products containing some asbestos in 1972. Even when BEH manufactured insulation products, those products contained only 10% asbestos. Those products represented 15% of BEH sales. Those products represented only 2% of Keene's sales. BEH was losing money and was shut down permanently in 1975.

Despite this limited involvement, since 1975—for the last 17 years—Keene has spent $400 million defending and resolving claims against BEH. If Keene had never bought BEH, plaintiffs and their lawyers would have exhausted BEH's assets in 1980 and the insurance coverage door might not have been opened. Keene now has only one operating subsidiary—and its contracts, orders and employees' jobs are totally threatened by this litigation.

When I opened my remarks, I told you that I've been described as cranky, irate, impolitic and lots more. If this combination of events:

- 2,000 new cases a month
- Continuing to pay fines for a company that stopped existing 17 years ago, and
- Spending millions to perpetuate the compensation of undeserving claims and outrageous lawyers fees. . .

. . . were happening to you and your company, don't you think you would be cranky, irate and impolitic too?

OTHER QUOTES ON LITIGATION AND THE ASBESTOS MONSTER

Overuse and abuse of the litigation process is reducing this nation's competitiveness, raising the price of products and eliminating thousands of American jobs.

America has one lawyer for every 300 people—about 70 percent of the world's attorneys—while Japan has one lawyer for every 10,000 people.

The nation's factory jobs fell 15 percent between 1980 and 1990 while the country's population increased by 23 million.

Civil justice reforms are needed to create an administrative solution for all present and future asbestos claimants.

Reforms are needed because more than 60 percent of all the money spent so far on asbestos litigation has gone to lawyers.

Reforms would unclog our courts and use available funds to meet the needs of future meritorious claimants.

For more information or additional reprints
write to Keene Corporation at
200 Park Avenue, New York, NY 10168
Or call (212) 557-1900

KEENE CORPORATION

REPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 616

September Term, 1992

KEENE CORPORATION

v.

ABATE, ET AL

Garrity,
Bloom,
Motz,

JJ.

Opinion by Motz, J.

Filed: July 1, 1992

The appeal before us is the most recent in the spate of asbestos-related cases winding through the State's court system. The sole question with which we are now faced is whether the Circuit Court for Baltimore City can constitutionally enjoin Keene Corporation ("Keene"), one of several defendants in a trial now underway, from advertising its views, before the jury returns a verdict, on the societal impact of the case and of asbestos litigation in general. Because the First Amendment to the United States Constitution and Article 40 of the Maryland Declaration of Rights prohibit such an injunction, on June 23,

1992, we entered a per curiam order vacating the lower court's order granting the injunction. We now explain the reasons for our decision.

(i)

The trial below began in February of 1992. From the outset, it has generated a great deal of public interest. Members of the White Lung Association have staged numerous demonstrations outside the courthouse, carrying picket signs and handing out fliers. The demonstrations at one point prompted the defendants, including Keene, to move for an injunction against the demonstrators. The trial court refused to grant the injunction because it "felt on a balancing consideration" it "could favor the First Amendment as [it] should and not have a risk to the jury"; instead it instructed the jury to ignore the demonstrators and to attempt to avoid them when entering and exiting the courthouse. One protestor nevertheless managed to corner a juror in a courthouse restroom in an effort to relate to the juror a tragic story regarding an asbestos-related illness. The juror immediately reported the incident to the court. The defendants moved for a mistrial which the court, after questioning the juror and instructing her to disregard the restroom conversation, denied.

On May 5, 1992, while evidence in the instant case was still being presented, the plaintiffs/appellees ("plaintiffs") filed a "Motion for an Order to Show Cause Against Defendant Keene Corporation." The plaintiffs complained that Keene's president and chief executive officer, Glenn W. Bailey, had improperly sent a letter *ex parte* to the trial judge. They asked the court to enjoin Keene from placing in local newspapers advertisements that might interfere with the fair and impartial deliberations of the

jury. The plaintiffs informed the trial court that Keene had been a defendant in similar litigation in Houston, Texas. While the jury was deliberating in that case, Bailey placed a paid advertisement in the Houston *Chronicle*. As a result of that advertisement, Keene was found in contempt of court. In another asbestos case, also in Texas, a judge issued an order enjoining Keene from any further "advertising regarding asbestos litigation in any and all newspapers which are published in Harris County, Texas" until the jury reached a verdict. The plaintiffs did not allege below that the advertisement in the Houston *Chronicle* was false or deceptive; in that advertisement, Bailey had complained that asbestos litigation had bankrupted a dozen companies, that Keene alone could be required to pay out millions of dollars, and that 60-percent of the money would go to lawyers.

In the matter *sub judice*, the trial court indicated that it did not intend "to let this trial be aborted" or "to allow the jury to be affected by undue publicity," and so set plaintiffs' motion in for prompt briefing and hearing. Six days later, on May 11, 1992, after hearing argument from counsel, the trial court granted the motion. The court commented that:

> Mr. Bailey does not have the absolute right to publish anything he wants with regard to this case. He is writing ex parte letters to this Court which is improper. But of more concern to me is the fact that, as I say, he takes out full page ads in newspapers while juries are deliberating and that is absolutely improper. He should not be allowed to communicate with this jury and that is all that a full page ad intends to do is to improperly communicate with this jury . . . .
>
> . . . I am going to sign an order which is adequate to prevent him from placing such an ad which, in my

> view, has no purpose other than to influence this jury.

In response to defense counsel's argument that such an order would infringe upon Bailey—and Keene's—First Amendment rights, the trial court stated: "I perceive a fundamental distinction between a newspaper reporter obtaining comment of both sides, Plaintiffs and Defendants, and a man taking out a full-page ad during the pendency of the case." On May 13, the court issued a written order enjoining Keene from "advertising regarding asbestos and/or asbestos litigation in any and all newspapers, television, radio or other media in the Baltimore, Maryland area during the pendency of this trial."

Thereafter, on May 21, Keene placed a paid advertisement in the Philadelphia *Inquirer*. In the advertisement, Keene again complained of the high costs of asbestos litigation and alleged that such litigation is "lawyer-inspired" and is causing "the unnecessary bankrupting of companies." The company suggested legislation that it asserted would bring the perceived problem under control and urged readers to support such legislation.

On May 13, pursuant to Maryland Courts & Judicial Proceedings Code Annotated § 12-303(3)(i), Keene timely noted an appeal to this Court. Because of the important constitutional question involved, we granted Keene's request to expedite consideration and advance the time for briefing and oral argument. In the meantime, Keene moved below to stay the injunction pending the instant appeal. The trial court denied the motion in open court without hearing argument from counsel. It did, however, offer further explanation as to its reasons for initially granting the injunction. The court referred to Glenn Bailey as a "loose cannon" and remarked that, as far as possible advertisements were concerned, "I don't know what he

has in mind. And he doesn't favor me with what he wants to do." It acknowledged that news articles about the trial had been published throughout the pendency of the proceedings, but again stated, "I see a big distinction between a paid ad in the newspaper and a news article, per se." The court opined that "even though I have cautioned my jury not to look at the newspapers, if they see a big bold-faced, full-page advertisement in our newspapers here, there is a risk that they will see it and look at it, even fragmentarily, and I don't think that a court ought to have to put up with that risk." The court commented, on the other hand, that its instructions to the jurors to avoid the demonstrators from the White Lung Association had "worked appropriately." In regard to the advertisement in the Philadelphia *Inquirer*, published after the order enjoining advertisements in the Baltimore area was entered, the court commented that "it would be improper for me to try to enjoin any publication in other newspapers outside of Maryland . . . ."

(ii)

There can be no dispute that the order enjoining Keene from "advertising regarding asbestos and/or asbestos litigation" in any and all media outlets in the Baltimore area during the pendency of the trial operates as a prior restraint on speech. A threshold question, however, is what type of speech the order seeks to regulate. The order anticipates an attempt by Keene to place advertisements, similar to those placed in Houston and Philadelphia, in Baltimore area newspapers. The trial court's distinction "between a paid ad in the newspaper and a news article" suggests that it believed the advertisement amounted to commercial speech. If that was the case, the advertisements would be entitled only to limited protection under

the First Amendment and Article 40. *See generally Virginia Pharamcy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-73 (1976) (commercial speech afforded First Amendment protection so long as it is not false and misleading and so long as transactions proposed in advertisement are not themselves illegal). *See also Freedman v. State*, 233 Md. 498, 505 (1964), *rev'd on other grounds*, 380 U.S. 51 (1965) (Article 40 of the Maryland Declaration of Rights is to be interpreted in *pari materia* with the First Amendment). That is not the proper classification of the advertisements, however.

Commercial speech is defined as "speech that proposes a commercial transaction." *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989) (emphasis omitted) (*citing Virginia Pharmacy Bd.*, 425 U.S. at 761-62). In common parlance, "advertising" means "the action of calling something . . . to the attention of the public[,] esp[ecially] by means of printed or broadcast paid announcements." *Webster's Third New International Dictionary* 31 (1981). The mere fact that speech is published in the form of a paid advertisement does not render it commercial speech. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (a paid advertisement, regarding the civil rights movement, that "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern" was not commercial speech).

The paid advertisements placed by Keene in the Houston *Chronicle* and the Philadelphia *Inquirer*, like the paid advertisement in *New York Times v. Sullivan*, addressed a matter of public concern. They expressed Keene's point of view, aired its grievances, and, in the case of the Philadelphia *Inquirer* advertisement, proposed legislative solu-

tions. Although the message that asbestos litigation should be controlled clearly promotes Keene's economic interests, the advertisements in no way "propose[d] a commercial transaction." *Board of Trustees, State Univ. of N.Y.*, 492 U.S. at 482. Indeed, Keene contends that it halted production of asbestos products 20 years ago. In short, the advertisements simply cannot be viewed as commercial speech. Because there is no reason to believe that the advertisements fall within any other category of speech warranting less constitutional protection, we can conclude only that they were fully protected.[1]

---

[1] Even assuming, *arguendo*, that the advertisements amounted to commercial speech, it seems clear that an order enjoining similar advertisements in Baltimore area newspapers would be improper. The Supreme Court explained in *Board of Trustees, State Univ. of N.Y.*, 492 U.S. at 480, that even restrictions on commercial speech must be "narrowly tailored to achieve the desired objective." In the instant case, the trial court indicated that its objective was to prevent interference with the fair and impartial deliberations of the jury. As we shall discuss *infra*, however, we are not persuaded that the ads posed a threat to those deliberations or that, even if they did, the court's solution was narrowly tailored. *See e.g., Peele v. Attorney Reg. and Disciplinary Comm'n.*, ___ U.S. ___, 110 S.Ct. 2281 (1990) (rule prohibiting attorneys from truthfully advertising that they were specialists in certain areas of the law struck down because it promoted no substantial state interest); *Shapero v. Kentucky Bar Ass'n.*, 486 U.S. 466 (1988) (prohibition on truthful and non-deceptive direct-mail solicitation of potential clients by attorneys struck down because it served no particular objective); *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328 (1986) (Puerto Rican act prohibiting gambling casinos from advertising locally if such advertisements were directed at residents rather than tourists upheld as being no more extensive than necessary to protect Puerto Rico's citizens from the harmful effects of gambling); *In re R.M.J.*, 455 U.S. 191 (1982) (Missouri Supreme Court rule that limited the categories of information allowable in lawyer advertisements struck down because it excluded relevant, truthful information and promoted no substantial State interest); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) (town ordinance that banned the posting

(Footnote continued on following page)

(iii)

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (striking down a court order that enjoined, until the jury was impaneled, certain news coverage in connection with a criminal trial). Moreover, the "conflict between the right to an unbiased jury and the First Amendment is 'almost as old as the Republic.' " *Quinn v. Aetna Life & Cas. Co.*, 482 F.Supp. 22, 27 (E.D. N.Y. 1979), *aff'd per curiam*, 616 F.2d 38 (2nd Cir. 1980) (*quoting Nebraska Press Ass'n v. Stuart*, 427 U.S. at 547). Although the right to a fair trial is jealously guarded, a court seeking to insure a fair trial may not impose a prior restraint unless "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Nebraska Press Ass'n*, *supra*, 427 U.S. at 562 (*quoting United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)).

In *State v. Cottman Transmission*, 75 Md. App. 647 (1988), this Court was called upon to determine the propriety of a trial court's order, issued in a civil case at the defendant's request, which closed the case file and proceedings to all but the participants and prohibited all communications with the press. *Id.* at 649. The defendant, an auto transmission company accused of various deceptive business practices, had alleged that the State was damaging the company's reputation and business by com-

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[1] *continued*

of residential "For Sale" signs struck down because there was no indication that it served the stated goal of stabilizing neighborhoods, and because less restrictive measures, such as posting "Not for Sale" signs, were available).

municating with the news media during the course of the trial. *Id.* at 653. We vacated the closure order in its entirety, *id.* at 658, and vacated the "gag order" to the extent that it prohibited even those communications with the press that did not concern the merits of the case. *Id.* at 661. We explained that a gag order can be upheld only "1) if the party seeking the order can establish that the speech to be restrained poses a 'serious and imminent threat' of interference with the fair administration of justice, . . . and 2) the order is 'tailored as precisely as possible to the exact needs of the case.' " *Id.* at 659 (citations omitted). *See also, Journal Newspapers, Inc. v. State*, 54 Md. App. 98, 110-12, *aff'd*, 297 Md. 68 (1983) (in vacating an order that enjoined certain classes of people from making extrajudicial statements regarding a criminal trial, this Court explained that, once a movant establishes "the need for *any* restriction . . . the [trial] court [should] proceed to look at the alternative methods of implementing the restriction, choosing always that or those which will do the job in the least intrusive and onerous manner") (emphasis in original); *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975) (in vacating an order that prevented parties to civil litigation from commenting to the press, the court noted that "[t]o justify imposition of a prior restraint, the activity restrained must pose a clear and present danger, or a serious or imminent threat to a protected competing interest. . . . The restraint must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms").

Although *Cottman* involved news coverage rather than paid advertisements, the speech that was the subject of the gag order, as in the instant case, was promulgated by a party to the case. We noted in *Cottman* that "a trial

court has the power to 'proscribe[ ] extrajudicial statements by any lawyer, party, witness, or court official which [might] divulge[ ] prejudicial matters . . . .' " 75 Md. App. at 660 (*quoting Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966)) (brackets added by *Cottman* Court). Such proscriptions, however, must be narrowly tailored. *See Id.* at 659-61. In applying the two-prong test set forth in *Cottman* to the particular facts of that case, we recognized that the speech at issue there could indeed interfere with the fair administration of justice by, in effect, trying the case in the press. "Because the tailoring of the trial court's gag order lacked the definition necessary to be constitutionally appropriate, [however,] this Court altered the order so as to provide a better constitutional fit." *Id.* at 660-61.

The trial court's order in the instant case fails to satisfy either prong of the two-prong test enunciated in *Cottman*, 75 Md. App. at 659.[2] Although the advertisements that

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[2] The few cases relied upon by the plaintiffs do not hold to the contrary; indeed, rather than supporting the issuance of the gag order, these authorities demonstrate the weakness of plaintiffs' claim. For example, although plaintiffs cite *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), for the proposition that "government may limit speech when compelling government interests outweigh free expression interests of the speaker," in fact, in *Landmark*, the Court held that the First Amendment prohibited criminal prosecution of those publishing truthful information regarding confidential judicial inquiry proceedings. *See also Gentile v. State Bar of Nevada*, ___ U.S. ___, 111 S.Ct. 2720 (1991) (Supreme Court *reversed* lower court and held that a state's application of its rule prohibiting a lawyer from making extrajudicial statements to the press violates the First Amendment); *Sheppard v. Maxwell*, 384 U.S. 333, 335-58 (1966) (even in face of reversal because of extremely prejudicial publicity and carnival-like trial atmosphere, Supreme Court did not advocate prior restraint of press or parties by the trial court).

appeared in the Houston *Chronicle* and the Philadelphia *Inquirer* complained of the high costs of asbestos litigation, neither advertisement in any way addressed the merits of a particular case. It simply cannot be said that publication of similar advertisements by Baltimore area media, even if viewed by the jurors, would pose a serious and imminent threat to the fair administration of justice.

This Court has explained that the record must contain support for a trial court's finding that a prior restraint is necessary to ensure a fair trial. *Journal Newspapers, supra*, 54 Md. App. at 111. The record before us contains no such support. Assuming, *arguendo*, that the sort of advertisements at issue here could have an adverse effect upon the trial, steps short of the prior restraint in question, such as careful instructions to the jury or even sequestration, could be taken. *See Nebraska Press Ass'n, supra*, 427 U.S. at 563-64 (setting forth alternatives to be tried before resorting to prior restraint of speech). The trial court, in denying Keene's earlier request for an injunction, concluded that the jurors could ignore demonstrators who were holding picket signs and distributing fliers outside the courthouse; that decision has not been challenged on appeal. It seems clear that properly instructed jurors could equally well ignore news articles and paid advertisements in the local media.

In sum, we are sympathetic to the experienced, long-suffering, trial judge's understandable, indeed commendable, desire to avoid prejudicial publicity and not permit this months-long trial to be "aborted." The First Amendment and Maryland Declaration of Rights, however, prohibit the use of a prior restraint to accomplish these goals absent the establishment of a serious and imminent threat to the fair administration of justice and an order tailored to the exact needs of the particular case.

Here, such a threat was never demonstrated, nor was such an order fashioned, and so we were required to vacate the judgment of the court below.[3]

[3] Except for the Texas courts, discussed within, that have sanctioned Keene in other cases, our conclusion here appears to be in accord with that reached by every other court to consider the propriety of a similar injunction on advertising. *See Quinn v. Aetna Life & Cas. Co., supra,* 482 F.Supp. at 27 (and numerous cases cited therein); *Rutledge v. Liability Insurance Industry,* 487 F.Supp. 5 (W.D. La. 1979); *New York Public Interest Research Group, Inc. v. Insurance Information Institute,* 531 N.Y.S.2d 1002 (Sup. Ct. 1988), *aff'd,* 554 N.Y.S.2d 590 (1990); *Kenner* [sic] *v. Monsanto Co.,* 492 N.E.2d 1327 (Ill. 1986).

92-285

Supreme Court, U.S.
FILED
SEP 17 1992
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

KEENE CORPORATION,
Petitioner,

V.

THE HONORABLE TONY LINDSAY,
Respondent.

BRIEF IN OPPOSITION FOR RESPONDENTS BENJAMIN AND NEOMA WILLIAMS, ET AL.

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QUESTIONS PRESENTED

1. Whether or not the Texas Supreme Court decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals, so as to invoke the jurisdiction of this Court.

2. Whether or not the Texas Supreme Court erred in dismissing Petitioner's Motion for Leave to file a Petition for Writ of Mandamus against the Honorable Tony Lindsay.

3. Whether or not the Texas Supreme Court decision rests upon independent and adequate state grounds that do not warrant review by this Court.

PARTIES TO THE PROCEEDING

In addition to Petitioner, Keene Corporation, and Respondent, the Honorable Tony Lindsay, real parties in interest to the proceeding include the twenty-two Plaintiffs alleging asbestos-related lung diseases and injuries consolidated in Judge Tony Lindsay's 280th Judicial District Court in Harris County, Texas for trial on the merits. Plaintiffs' Counsel include John Eddie Williams and Melinda Louise Wesner of Umphrey, Williams & Bailey, 8441 Gulf Freeway, Suite 600, Houston, Texas 77017 and the attorneys of the law firm of Ness, Motley, Loadholt, Richardson & Poole, 151 Meeting Street, Suite 600, Charleston, South Carolina 29402.

The real parties in interest, Plaintiffs from Judge Lindsay's District Court, who were consolidated for the asbestos trial, include the following persons:

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I.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

V.

THE HONORABLE TONY LINDSAY,

Respondent.

BRIEF IN OPPOSITION
FOR RESPONDENTS
BENJAMIN AND NEOMA WILLIAMS, ET AL.

To The Chief Justice and Associate Justices
Of the Supreme Court Of The United States:

Respondents, who are twenty-two Plaintiffs who were consolidated for an asbestos trial in the Honorable Tony Lindsay's 280th Judicial District Court, and Plaintiffs' Counsel, John Eddie Williams and Melinda Louise Wesner, (hereinafter "Respondents"), respectfully oppose a writ of certiorari to the Supreme Court of the State of Texas:

OPINIONS BELOW

This is an original mandamus action that was brought by Keene Corporation seeking to compel the Court of Appeals and Texas Supreme Court to grant a mandamus against the Honorable Tony Lindsay, to mandate that the trial judge vacate a trial court order.

On March 24, 1992, Judge Tony Lindsay signed an order that Keene Corporation shall not place advertisements regarding punitive damages and attorneys fees in reference to asbestos litigation, in any newspaper published in Harris County, Texas until the verdict of the jury was received by the Court. The Order is set forth in the Appendix at p.1.

On March 26, 1992, Keene Corporation, filed a motion for leave to file petition for writ of mandamus and prohibition, in the First Court of Appeals of the State of Texas. On April 1, 1992, Keene Corporation filed an amended petition for writ of mandamus. On April 2, 1992, in a per curiam opinion, the Fourteenth Court of Appeals of the State of Texas, declined Keene's request to order Judge Lindsay to vacate her order, and overruled Keene's motion for leave to file a petition for writ of mandamus and writ of prohibition. The opinions of the Fourteenth Court of Appeals are reproduced in the Appendix at pp.2-5.

On April 7, 1992, the jury concluded their deliberations concerning the asbestos plaintiffs in Judge Lindsay's trial court and rendered a verdict.

Keene Corporation then sought issuance of a writ of mandamus against the Honorable Tony Lindsay from the Texas Supreme Court, alleging Judge Lindsay's decision was arbitrary and unreasonable and that she clearly abused her discretion as a trial court. On April 15, 1992, the Texas Supreme Court dismissed as moot Keene's motion for leave to file petition for writ of mandamus. Reproduced in the Appendix at pp.6-7. Thereafter, on May 20, 1992, the Texas Supreme Court overruled Keene Corporation's motion for rehearing of its motion for leave to file petition for writ of mandamus against Judge Lindsay. Reproduced in the Appendix at pp.8-9.

CONSTITUTIONAL PROVISION

Respondent does not believe that this case involves a federal question or constitutional provision, rather it involves independent State procedural and substantive issues. However, should this Court determine the Texas Supreme Court's decision warrants invoking the jurisdiction of this Court, then Respondents respectfully request this Court consider the Seventh Constitutional Amendment that the right of trial by jury shall be preserved, set forth in the Appendix at p.10.

STATEMENT OF THE CASE

Petitioner has failed to set forth a full statement of the underlying facts that gave rise to this petition. Keene Corporation was an asbestos defendant in a group of six (6) asbestos-related lung disease cases that had been consolidated for trial in Cause No. 85-44379, Orsak v. A C & S, Inc., et al, in the 127th Judicial District Court, Harris County, before Judge Sharolyn Wood. On March 5, 1992, during jury deliberations and after the close of evidence, asbestos-defendant Keene Corporation intentionally placed an advertisement in the Houston Chronicle, reproduced in the Appendix at p.11. Keene's advertisement improperly communicated with the jurors concerning specific questions and issues that were involved in the pending trial and on which the jury was actually deliberating at that very moment. (i.e. punitive damages). Keene further communicated with the jurors concerning issues that were not only inadmissible during the trial of this case, but issues and matters that the Court specifically informed the jurors not to consider. (i.e. attorneys fees) Tex. R. Civ. P. 226a II(8). Although Defendant Keene Corporation represented to the Court that the appearance of this advertisement was a "mere coincidence", on April 8, 1992, Judge Sharolyn Wood ordered Keene Corporation to produce for the Courts' inspection all documents and correspondence concerning Keene's advertising and particularly any tangible thing that would show Keene's intent in placing the advertisement

during jury deliberations and whether it was a "mere coincidence." Judge Wood's April 8, 1992 order is reproduced in Appendix at p.12.

Although Keene Corporation represented it would comply with Judge Woods' document production order, Keene Corporation turned around and filed an appeal, withdrawing its offer. See Appendix at pp.13-14.

Upon reading Keene's quarter-page advertisement in the newspaper and subsequent to oral hearings on the matter, Judge Sharolyn Wood found the following:

> If there were allowed to this court a more sizeable fine that is more commensurate with the harm and the injury done, I would have assessed it. I have assessed the maximum fine as is appropriate under the laws of Texas for the contempt -- criminal contempt that occurred in the jury deliberation process in this case. That to me is absolutely abhorrent of a free society trying to have the kind of jury trial that we had that a (sic) is free from secret evidence, because as I made it very clear today, I see this as an absolute attack on the integrity of trial by jury and trial as we know it in this nation. I take it most seriously.

The Honorable Sharolyn Wood, Judge presiding, on June 11, 1992, in Orsak v. A C & S, Inc., et al, Case No. 85-44379, District Court of Harris County, Texas, 127th Judicial District, imposing the maximum sentence permitted under Texas Law for criminal contempt on Keene Corporation for publishing an advertisement in the Houston Chronicle while

a jury was deliberating after a 30 day trial against Keene Corporation. Excerpt of the proceedings is set forth in the Appendix at pp.15-18.

Judge Wood found that the defendant, Keene Corporation placed an advertisement concerning the merits of the cause on the third day of jury deliberations and that such conduct was an attempted communication in violation of the rules prohibiting parties, their attorneys and others interested in the merits of a case, from communicating with jurors prior to their being excused from the case. See Order of contempt in Appendix at pp.13-14.

To prevent any further jury tampering or improper communications with the jurors, in the next upcoming trial where Keene Corporation was a Defendant, Judge Tony Lindsay entered the March 24, 1992 order of which Keene Corporation now complains. Judge Lindsay's March 24, 1992 order is reproduced in the Appendix at p.1.

Contrary to Petitioner's assertions, Judge Tony Lindsay's order set forth in very explicit and precise language, the specific issues and facts that the Keene Corporation was prohibited from communicating to the Harris County jury until the jury returned its verdict (i.e. punitive damages and attorneys fees).

Respondents submit that Keene Corporation has wholly failed to sustain its burden of proving that Judge Tony Lindsay's decision was arbitrary and unreasonable and that Judge Lindsay abused her discretion. Respondents would further show that the Texas Supreme Court did not err in

dismissing Keene's request for mandamus against Judge Lindsay, that this case is distinguishable from those relied upon by Petitioner, that the Texas Supreme Court's decision does not conflict with other court decisions so as to invoke the jurisdiction of this Court, nor does a federal question exist that would warrant United States Supreme Court review.

REASONS FOR REFUSING THE PETITION

I.

The Texas Supreme Court did not decide a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals, so as to invoke the jurisdiction of this Court.

Petitioner's complaints do not invoke jurisdiction for review on writ of certiorari for several reasons. First, based upon the particular facts as presented in this case, the Texas Supreme Court did not decide a federal question in a way that conflicts with another state court of last resort or of a United States court of appeals. Second, the Texas Supreme Court did not err in refusing to grant Petitioner's writ of mandamus against Judge Lindsay. Third, the Texas Supreme Court's decision rests upon independent and adequate state grounds that do not warrant review by this Court.

A. Judge Lindsay's Order and the Texas Supreme Court's denial of writ of mandamus is not in conflict with the Maryland Opinion.

Petitioner alleges that Judge Lindsay's order and the Texas Supreme Court's denial of a writ of mandamus against Judge Lindsay, stand in direct contrast to a recent decision of the Maryland Court of Special Appeals. Keene Corp. v. Abate, ___Md. App. ___ (July 1, 1992). This is not true. The sole issue before the Maryland Court was whether the Circuit Court could enjoin Keene from advertising its views on the societal impact of asbestos litigation in general. Not only were the advertisements in question different from one another, but most importantly, the orders of the lower courts are readily distinguishable. The May 13, 1992, Circuit Court of Baltimore City order enjoined Keene from advertising regarding asbestos and/or asbestos litigation. Judge Lindsay's March 24, 1992 order however, was narrowly tailored to restrict Keene's communications with prospective Harris County jurors as to a specific litigant involved in her court and concerning specific issues upon which the jurors would be deliberating. Pursuant to the Plaintiff's pleadings on file before Judge Lindsay, and the evidence to be presented at trial, Judge Lindsay's jury would be required to make a specific finding from the facts as to the issue of punitive damages against litigant, Keene Corporation. Judge Lindsay's order was specifically tailored to restrict Keene's communications with prospective Harris County jurors regarding only two issues: punitive

damages and attorney's fees. The order was narrowly tailored as to subject matter, scope, duration and location.

Keene's previous attempted communications with Harris County jurors clearly violated Texas Procedural and Evidentiary Rules, which exclude evidence from trial concerning collateral sources, insurance, the effect of the jury's answers, and attorneys fees. Tex. R. Civ. P.226a (attorneys fees not admissible in this trial), Tex. R. Civ. Evid. 411 (liability insurance not admissible in this trial).

Keene further attempted to communicate with Harris County jurors concerning particular facts and issues that Keene was not permitted to bring into evidence before the jury in a Texas courtroom. Keene knowingly and intentionally attempted communications with Harris County jurors concerning particular issues Keene could not get into evidence in a Texas courtroom, concerning legal fees, bankruptcy, the effect of asbestos litigation on the nation's economy, and Keene's losses from asbestos lawsuits. See Keene Corporation advertisement reproduced in Appendix at p.11. See also, Tex. R. Civ. Evid. 409, 411, 503, 802 and 805. Keene violated the Texas Rules of Civil Procedure and Evidence, and went around the States' procedural rules so as to interfere with the administration of justice and communicate "secret evidence" to Harris County jurors that Keene knew full well it was not permitted to communicate to the jury in a Texas courtroom. If parties to a lawsuit are permitted to present evidence to a jury through newspapers, then the rules of evidence should be abolished and our history of attempting to preserve a fair trial should be overturned.

Further, the particular issues Keene attempted to communicate to Harris County jurors would have further violated Plaintiffs' Motion in Limine, which excluded such evidence.

B. Keene's Advertising Was False and Misleading

In addition, the particular statements that the Keene Corporation attempted to communicate to Harris County jurors were false and misleading. See Keene advertisement in Appendix at p.11. Keene misleadingly implies that the twelve co-defendants who have filed for "bankruptcy" have done so because of asbestos jury verdicts. Keene fails to state whether the alleged "$500 million in court awards" includes the fines for contempt against Keene or punitive damages findings against Keene. Keene misleads prospective jurors into believing that Keene compensates injured asbestos victims. Keene misleads Harris County jurors into believing that less than half of the alleged $500 million goes to the "injured parties" and that "60 percent goes to lawyers". Keene fails to point out that the majority appears to go to Keene's own lawyers. Keene further denies it did anything "illegal," yet jurors have repeatedly judged Keene's conduct as deserving of punitive damages. Keene further misrepresents that it "doesn't mind paying injured parties" when to this date, Keene still refuses to compensate injured plaintiffs, refuses to negotiate reasonable settlements, intentionally continues to clog the trial dockets unnecessarily, and illegally communicates with jurors.

C. Keene Found in Contempt of Court - Jury Tampering

Judge Lindsay narrowly tailored her order to restrict Keene's communications with Harris County jurors as to two specific issues, so as to achieve the desired objective of preventing Keene's further violation of the Texas Rules of Civil Procedure and Evidence, and to prevent Keene's further interference with fair and impartial jury deliberations. This case is further distinguishable due to other proceedings against Keene that were ongoing at this time in the very same Courthouse.

A Texas District Court Judge made the judicial finding, after briefing and oral argument, that Keene violated state civil procedural laws. See Judge Sharolyn Wood's findings, Order of Contempt, App. pp.13-14 and transcript, App. pp.15-18. Judge Sharolyn Wood of the 127th Judicial District Court found that Keene was interfering with the administration of justice and the state procedural laws governing the jury deliberation process. Id. The District Court further found that Keene's actions were an attack on the integrity of the jury trial and that Keene's conduct was an attempted violation of the States' rules prohibiting parties from communicating with jurors. Id.

Judge Sharolyn Wood further found that Keene caused an advertisement to appear concerning the merits of the case, after the close of evidence and during jury deliberations. Judge Wood held Keene in contempt of court for violating state laws prohibiting attempted communications with jurors,

and imposed the maximum permissible fine for interfering with the administration of justice and an abhorrent attack on the integrity of trial by jury and jury tampering. Id.

Petitioner has failed to show that Judge Lindsay's decision was arbitrary and unreasonable so as to amount to a clear abuse of discretion to warrant a writ of mandamus. Jampole v. Touchy, 673 S.W.2d 569 (Tex. 1984).

D. No conflict exists with other Court decisions so as to invoke jurisdiction of this Court

The Texas Supreme Court did not decide a federal question in a way that conflicts with other courts so as to invoke the jurisdiction of this Court.

This is an original mandamus action which was sought to compel the Texas Court of Appeals and Texas Supreme Court, to issue a writ of mandamus against the Honorable Tony Lindsay of the 280th Judicial District Court, ordering the trial judge to vacate her order of March 24, 1992. Petitioner chose to take this issue up on appeal in the form of a writ of mandamus against Judge Tony Lindsay. As such, Petitioner had the burden of proving that Judge Lindsay's decision was so arbitrary and unreasonable as to amount to a clear abuse of discretion. Joachim v. Chambers, 815 S.W.2d 234 (Tex. 1991). Petitioner has failed to show that Judge Lindsay abused her discretion as a trial judge.

In addition to Petitioner failing to show a clear abuse of discretion under these circumstances, the case law relied

upon by Petitioner in its attempts to invoke jurisdiction of this Court, is not on point and readily distinguishable. Petitioner relies upon Quinn v. Aetna Life & Cas. Co., 482 F. Supp. 22 (E.D.N.Y. 1979), aff'd per curiam, 616 F.2d 38 (2nd Cir. 1980), which was before the Court on Defendant's Motion for Summary Judgment. The Court found that although Plaintiff had sued Aetna Ins. Co. directly, contending "sham defendants," no cause of action existed under New York law for the equitable remedy (injunction) Plaintiff sought and Plaintiff's complaint was dismissed. The Quinn case, supra, did not involve a narrowly tailored order based upon state law, which restricted a contemptuous litigant's communications with jurors during the pendency of an ongoing trial, but rather involved the abstention doctrine and an overly broad injunction and complaint, for which no cause of action nor remedy existed under state law.

Petitioner also relies on Rutledge v. Liability Ins. Industry, 487 F. Supp. 5 (W.D. La. 1979) another motion for summary judgment case where Plaintiff, an attorney, brought suit against a class of insurance companies to enjoin a general campaign concerning tort reform. Again, this was a motion for summary judgment case that did not involve improper communications about specific issues to jurors.

Kemner v. Monsanto Co., 492 N.E.2d 1327 (1986) was also an appeal, not a mandamus as in our case, that involved a dismissal for lack of jurisdiction and forum non convenience. In reaching its conclusion that the trial court's order was overly broad because it prohibited "all mention" of the case to the media, the Court held that a trial court can,

however, restrain parties from making extrajudicial comments about pending civil litigation if the order is not overly broad and the trial court establishes that the conduct poses a reasonable likelihood of a threat to the fairness and integrity of the trial, both of which were found by the Texas District Court Judge(s) herein. Kemner at 1337, 1338.

The NYPIRG case relied upon by Petitioner is again not on point. In NYPIRG v. Insurance Information Institute, 531 N.Y.S. 2d 1002 (Sup. Ct. 1988), Defendant brought a motion to dismiss Plaintiffs deceptive practices and false advertising suit for violation of state statutes based upon Defendant's "lawsuit crisis" advertising campaign. There was no finding by the trial court of interference with the administration of justice, an attack on the fairness and integrity of the trial, a serious and imminent threat to the litigant's right to a fair jury trial, jury tampering, nor contemptuous behavior, as lies in the case before this Court. Further, NYPIRG did not involve a narrowly tailored order, rather a DTPA claim against a general "tort reform" campaign, which was clearly overly broad.

Of interest in the Ruggieri case, also relied upon by Petitioner, the Defendant, Raybestos-Manhattan, was requesting the Court enjoin Plaintiff attorney Ron Motley from participating in any other asbestos litigation or making any extrajudicial comments concerning any asbestos cases. Ruggieri v. Johns-Mansville Prod. Corp., 503 F. Supp. 1036 (D.R.I. 1980). Needless to say, the Defendant's requested remedy was found to be too broad. The Court did state however, that when the trial was reached at some time in the

future, the Court could then assess what, if anything, needed to be done to assure a fair jury trial. Ruggieri at 1041.

Finally, in State v. Cottman Transmission, 542 A.2d 859 (Spec. App. 1988), the trial court's order that "there be no communications with the press" was found to be too sweeping. The Court however, recognized that the Attorney General's authority to protect and warn consumers did not confer upon him the right to "try the case in the press." Id. at 865. The Court found the trial court properly concluded the Attorney General's comments and news releases would seriously undermine the fair administration of justice. Id. The Court therefore, tailored the trail court's gag order so as to prescribe only comments relative to the merits of the case. Similarly, Judge Tony Lindsay narrowly tailored her order so as to preserve the fair administration of justice, prevent further contemptuous behavior by a litigant that was an imminent threat to other litigants' rights to a fair jury trial, and to prohibit only advertisements during the pendency of the trial as to two narrow issues: punitive damages and attorneys fees.

Petitioner has wholly failed to sustain its burden of proving abuse of discretion by Judge Tony Lindsay. To the contrary, the lower courts' found Keene's actions interfered with the fair administration of justice and was contemptuous behavior by a litigant that posed a serious and imminent threat to other litigants' rights to a fair jury trial. Accordingly, Judge Lindsay narrowly tailored an order to restrict Keene's communications with jurors in the pending trial on two specific issues upon which the jurors would

either be deliberating or were impermissible as "secret evidence."

Petitioner has further failed to provide state or federal decisions involving significantly similar factual situations that are inconsistent with the particular facts before the Court in this case. Petitioner has further failed to show how the Texas Supreme Court's refusal to grant Petitioner's requested writ of mandamus against Judge Lindsay was in error or how the Texas Supreme Court's refusal to grant a writ of mandamus conflicts with another Court's decision. Based upon the particular facts of this case, there is no conflict with another Court's decision that would invoke the jurisdiction of this Court concerning the Texas Appellate Courts' declining to grant Petitioner's request for a mandamus against Judge Lindsay.

II.

The Texas Supreme Court did not err in dismissing Petitioner's Motion for Leave to file a Petition for Writ of Mandamus against the Honorable Tony Lindsay.

This case is moot. There is no actual case nor controversy in existence to be reviewed by this Court. Judge Lindsay's March 24, 1992 order was only in effect from March 24, 1992 until the jury ceased deliberations and rendered a verdict, which occurred on April 7, 1992. On March 27, 1992, the Fourteenth Court of Appeals declined to order Judge Lindsay to vacate the order and overruled Petitioner's motion for leave to file petition for writ of

mandamus and prohibition. Although the order was not yet moot, on March 27, 1992, the Fourteenth Court of Appeals clearly declined to issue a writ of mandamus against Judge Lindsay to vacate her order or a writ of prohibition against Plaintiffs' Counsel prohibiting such future orders in asbestos litigation. After the jury returned its verdict and Judge Lindsay's order ceased to be in effect, there was no case nor controversy for the Texas Supreme Court to address by way of a Writ of Mandamus.

This case does not fall within the "capable-of-repetition-yet-evading-review" exception to mootness. It is shear speculation on the part of Petitioner to guess what action, if any, may be taken by another trial judge during future asbestos trials involving Keene Corporation. It would be nothing more than supposition to surmise what Harris County judges may or may not order in future asbestos cases. Contrary to Petitioner's representations to this Court, the vast majority of those asbestos cases set for trial involving Keene Corporation and Plaintiffs' Counsel, John Eddie Williams, as set forth in Exhibit A to Petitioner's Motion for Rehearing have been settled or resolved. See Petitioner's Appendix at pp. 27-33. Of those asbestos cases with trial settings that are listed in Petitioner's Exhibit A, only the last five groups remain, most of which have already been passed. See Petitioner's Appendix at pp. 32-33. There is no evidence of record to even show that this issue will be repeated in the future, that Keene will attempt to violate Texas rules in the future to communicate with deliberating jurors again, nor what action, if any, may be taken by a

District Court judge concerning Keene's contemptuous behavior.

As set forth by this Court in Murphy v. Hunt, 455 U.S. 478, 482-4 (1982) (per curiam), this Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the test stated in Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam). Murphy at 482. If this were true, virtually any matter of short duration would be reviewable by this Court. Id. Rather, there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party. Murphy at 482, citing to Weinstein at 149. There is no comparable set of expectations in this case. The case presented is now moot and was moot at the time of the decision by the Texas Supreme Court.

III.

The Texas Supreme Court's decision rests upon independent and adequate state grounds that do not warrant review by this Court.

The Texas Supreme Court has long recognized that once an appeal is rendered moot, only two exceptions to the mootness doctrine apply so as to confer upon the court jurisdiction to decide the merits of the case. General Land Office v. OXY U.S.A., Inc., 789 S.W.2d 569, 571 (Tex. 1990). As the Texas Supreme Court found in General Land Office, similarly, the controversy before this Court is moot

and does not fall within the exception to normal principles of mootness.

The Texas Supreme Court has not misapplied Texas mootness law by finding this case moot. To the contrary, the Texas Supreme Court accurately applied Texas case law in refusing to grant Petitioner's requested writ of mandamus against Judge Lindsay. Petitioner has failed to show how Judge Lindsay's decision was capricious and arbitrary and a clear abuse of her discretion as a trial judge, so as to warrant a mandamus. Petitioner has further failed to show how this case falls within the "capable-of-repetition-yet-evading-review" exception to the normal principles of mootness so as to warrant review by the Texas Supreme Court.

In addition, the Texas Supreme Court's dismissal of Petitioner's motion for leave to file petition for writ of mandamus against Judge Tony Lindsay rests on independent and adequate state grounds not to warrant this Court's review. In this case, the issue of mootness itself is not a question of federal law, but state substantive and/or procedural law. Petitioner chose to take this issue before the appellate courts in the form of a writ of mandamus and prohibition. Contrary to Petitioner's allegations, the issue of mootness in this case does not constitute a federal question warranting this Court's own independent mootness analysis under federal law. Rather, this is purely a matter of state law, a requested mandamus and Petitioner's burden therein. A careful review of Texas case law, even that relied upon by Petitioner, reveals that the Texas Supreme Court did not

misapply its own procedural rules nor substantive case law on the issue of mootness.

CONCLUSION

Contrary to Petitioner's representations, this case does not present a federal question concerning a litigant's right to comment on political issues during the pendency of the trial. To the contrary, this case involves a narrowly tailored order by a trial court judge seeking to enforce the rules preventing communications by a party to jurors during a jury trial.

The Texas Supreme Court did not decide a federal question in a way that conflicts with other court decisions. The Texas Supreme Court did not err in dismissing Petitioner's motion for leave to file petition for writ of mandamus against the Honorable Tony Lindsay. The Texas Supreme Court's decision clearly rests upon independent and adequate state grounds that do not warrant review by this Court. This case involves false and misleading advertising by a contemptuous litigant, whose conduct violated the State's rules concerning jury tampering, interfered with the administration of justice, was assessed the maximum permissible fine, and now appeals to this Court attempting to invoke jurisdiction under an alleged federal question conflict with other court decisions, which simply does not exist.

For these reasons, Respondents respectfully request that in its judicial discretion, this Court deny Petitioner's request for a review on writ of certiorari.

Respectfully submitted,

By: _____
JOHN EDDIE WILLIAMS, JR.
(Counsel of Record)

_____
MELINDA LOUISE WESNER

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Attorneys for Respondents,
Benjamin and Neoma Williams, et al.

APPENDIX

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NO. 84-69709

BENJAMIN C. WILLIAMS AND NEOMA WILLIAMS	§ § §	IN THE DISTRICT COURT OF
v.	§ § §	HARRIS COUNTY, TEXAS 151ST [sic]
AC&S, INC. ET AL.	§	JUDICIAL DISTRICT

ORDER

BE IT REMEMBERED that on March 16, 1992 commenced the consolidated trial in the 280th District court of the above-named Plaintiffs against the Keene Corporation. From this day until the verdict of the jury is received by this Court, the Defendant Keene Corporation is prohibited from advertising regarding punitive damages and attorney's fees in reference to asbestos litigation, in any newspapers which are published in Harris County, Texas. Attached as Exhibit "A" to this Order is a copy of an advertisement which the Defendant Keene Corporation placed in the *Houston Chronicle*, a Harris County Newspaper, on March 5, 1992. On that same day in Harris County a jury was deliberating in a trial in which the Defendant Keene Corporation was a party. It is therefore,

ORDERED, ADJUDGED AND DECREED that Keene Corporation shall not place advertisements regarding punitive damages and attorney's fees in reference to asbestos litigation, in any newspaper published in Harris County, Texas until the verdict of the jury in the above-referenced cases is received by this Court. The ORDER of MARCH 16, 1992 prohibiting KEENE from advertising is WITHDRAWN.

SIGNED the 24th day of March, 1992.

/s/ TONY LINDSAY
JUDGE PRESIDING

[SEAL OF THE STATE OF TEXAS]

In The
Fourteenth Court of Appeals

NO. C14-92-00312-CV

KEENE CORPORATION, Relator

V.

THE HONORABLE TONY LINDSAY, JOHN EDDIE WILLIAMS, THE ATTORNEYS OF THE LAW FIRM OF UMPHREY, BURROW, WILLIAMS, AND BAILEY and THE ATTORNEYS OF THE LAW FIRM OF NESS, MOTLEY, LOADHOLT, RICHARDSON, AND POOLE, Respondents

ORIGINAL PROCEEDING
WRIT OF MANDAMUS

OPINION

On March 16, 1992, respondent, the Honorable Tony Lindsay, ordered that relator is prohibited from advertising regarding asbestos litigation in any and all newspapers that are published in Harris County, Texas.

Relator asks that we order Judge Lindsay to vacate that order. We decline to do so and overrule the motion for leave to file petition for writ of mandamus.

PER CURIAM

Motion for leave to file Petition for Writ of Mandamus Overruled March 27, 1992 and Opinion filed April 2, 1992.

Panel consists of Justices Junell, Robertson, and Draughn. (Justice Robertson not participating).

Do not publish - TEX. R. APP. P. 90.

[SEAL OF THE STATE OF TEXAS]

In The
Fourteenth Court of Appeals

NO. C14-92-00309-CV

KEENE CORPORATION, Relator

V.

THE HONORABLE TONY LINDSAY, JOHN EDDIE WILLIAMS, THE ATTORNEYS OF THE LAW FIRM OF UMPHREY, BURROW, WILLIAMS, AND BAILEY and THE ATTORNEYS OF THE LAW FIRM OF NESS, MOTLEY, LOADHOLT, RICHARDSON, AND POOLE, Respondents

ORIGINAL PROCEEDING
WRIT OF PROHIBITION

OPINION

On March 16, 1992, respondent, the Honorable Tony Lindsay, ordered that relator is prohibited from advertising regarding asbestos litigation in any and all newspapers that are published in Harris County, Texas.

Relator, in cause no. C14-92-00312-CV, asks that we order Judge Lindsay to vacate that order. In this action, relator asks that we prohibit respondents, John Eddie Williams, the attorneys of the law firm of Umphrey, Burrow, Williams, and Bailey and the attorneys of the law firm of Ness, Motley, Loadholt, Richardson, and Poole, from requesting such an order in future asbestos litigation. Having overruled the motion for leave to file writ of mandamus in cause no. C14-92-00312-CV, we overrule the motion for leave to file petition for writ of prohibition.

PER CURIAM

Motion for leave to file Petition for Writ of Prohibition Overruled March 27, 1992 and Opinion filed April 2, 1992.

Panel consists of Justices Junell, Robertson, and Draughn. (Justice Robertson not participating).

Do not publish - TEX. R. APP. P. 90.

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

April 15, 1992

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RE: Case No. D-2264
Style: KEENE CORPORATION
v. THE HONORABLE TONY LINDSAY, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas dismissed as moot relator's motion for leave to file petition for writ of mandamus in the above styled case. (Chief Justice Phillips not sitting.)

Sincerely,

John T. Adams, Clerk

by /s/ BLANCA E. MORIN
Blanca Morin, Deputy

cc: Mr. Joe Cox
Honorable Tony Lindsay

THE SUPREME COURT OF TEXAS
P.O. Box 12248
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John T. Adams, Clerk

May 20, 1992

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RE: Case No. D-2264
Style: KEENE CORPORATION
v. THE HONORABLE TONY LINDSAY, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for rehearing of motion for leave to file petition for writ of mandamus in the above referenced case.

Sincerely,

John T. Adams, Clerk

by /s/ COURTLAND CROCKER
Courtland Crocker, Deputy

cc: Mr. Joe Cox
Honorable Tony Lindsay

UNITED STATES CONSTITUTION - AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Legal fees Up, up and away

GLENN W. BAILEY, chairman and president of Keene Corp., isn't the most objective observer of the asbestos lawsuits his company has endured.

But since the company will be shelling out $500 million in legal fees, Bailey does offer a unique insight into America's court system.

In case you missed Bailey's letter to the editor, here is a synopsis. In 1968, Keene bought a small maker of acoustical ceilings, ventilation systems and insulation products for $8 million. Some of that insulation included asbestos. The company ceased production in 1972.

Keene's losses didn't end there. They had just begun. Asbestos led to lawsuits and a whopping $500 million in court awards and legal fees. So far, 12 co-defendants have been bankrupted.

Bailey says he doesn't mind paying injured parties, but the punitive damages and legal fees are absurd. Less than half the $500 million will actually go to anyone injured by asbestos. The rest--60 percent--goes to lawyers.

"A criminal can be punished only once, while a manufacturer might be punished thousands of times for a single act--even though, as in our case, we did nothing that was illegal," Bailey wrote.

That's not justice. It's abuse.

Not only does injustice harm the nation's soul, but its economy as well. Vice President Dan Quayle's Council on Competitiveness found that litigation is now a $300 billion drag on the economy.

That's what happens when you have 70 percent of the lawyers in the world.

The above editorial appeared on December 31, 1991
in West Virginia's Charleston Daily Mail
and is reprinted with its permission.

●●●

"We are encouraged
that the facts are getting through
concerning a serious problem
that affects all Americans."

For further information write to
Keene Corporation
200 Park Avenue, New York, NY 10166

Cause No. 86-28018

JAMES W. OGLE, ET UX	§	IN THE DISTRICT COURT OF
	§	
V.	§	HARRIS COUNTY, TEXAS
	§	
KEENE CORPORATION	§	127TH JUDICIAL DISTRICT

ORDER OF CONTEMPT

On March 6, 1992, came on to be heard the motion to accept the verdict in the above styled and numbered cause. And the Court finding that the Defendant THE KEENE CORPORATION did cause to appear in *The Houston Chronicle* an advertisement concerning the merits of this cause on the third day of jury deliberations in this cause, that such conduct is an attempted communication in violation of the rules prohibiting parties, their attorneys and others interested in the merits of a case from communicating with the jurors prior to the jurors being excused from the case, that such Defendant represented to the Court that it would produce the documents to demonstrate that the appearance of the advertisement was a "mere coincidence" on or before the 20th of April, 1992, that the order reflecting such representation was set aside when such offer was withdrawn by the filings in the Court of Appeals for the 14th Supreme Judicial District on or about April 16, 1992, and that the case must proceed to judgment, it is therefore

ORDERED, ADJUDGED and DECREED that the verdict be accepted and judgment rendered on the verdict filed. It is further

ORDERED, ADJUDGED and DECREED by the Court that THE KEENE CORPORATION is in contempt of this court for communication attempted with the jurors during their deliberations on the verdict in the above styled and numbered cause by placing or causing to be placed in *The Houston Chronicle* the attached exhibit on March 5, 1992.

Hearing on the sentencing for such conduct is set for June 11, 1992, at 9:00 a.m.

Signed this the 1st day of June, 1992.

by /s/JUDGE S. WOOD
JUDGE PRESIDING

You guys are now the only educated lawyers in town as to what you better be doing.

MR. ISGUR: We're suppose to wait here while your thinking about it right now?

THE COURT: I'm going to think about it.

(Recess was taken)

THE COURT: I don't know when we started this hearing if we put on the record who all was here. The respondent are here this morning. Do you wish to put anything on the record who was here or anything.

MR. ISGUR: I believe we did.

THE COURT: I asked for announcements, but I guess you made it.

MR. ISGUR: I think this so, but I'm Marvin Isgur, I-s-g-u-r, on behalf of Keene Corporation, along with Thomas Kirkendall, K-i-r-k-e-n-d-a-l-l.

THE COURT: And then some other officials and people with you here today?

MR. ISGUR: That is correct, but I don't believe they are making an appearance in the contempt matter.

THE COURT: Okay. And the plaintiffs were here, Mr. Williams was here. I don't think we ever heard that the trial counsel in the case were here. Mr. Kerkher is here and Mr.--

MR. EBLE: Eble.

THE COURT: Correct, and I apologize for stumbling over that.

SCOTTY G. BALDWIN
OFFICIAL COURT REPORTER

MR. WILLIAMS: He even brought the little Eble, Mathew Eble.

THE COURT: I thought maybe the visitor was from South Carolina. Looks like he is. I didn't know that I had given anybody even an opportunity to go on the record.

This is where I see where we are. What is it name of the motion you filed this morning?

MR. KIRKENDALL: I believe it's a motion to postpone, your Honor.

THE COURT: Motion to postpone is denied. And I do find that the sentencing--and I'll tell you. I looked at, you know, what do you do when it's a corporation? And I determined that--that I would just have a fine, and I believe that's still where I am, and it's $500 per case. Pulling the original contempt orders when they left my hands they had an exhibit attached. There are lots of staple holes in and the exhibits are no longer attached, so I'll gladly add the contempt order back, and I'll add the exhibit back to the contempt order, which was the ad, and I will redo that, and I will prepare--I tried. The typewriter went kaput. Until Scotty figures out how to fix it, I can't even type anything.

I will prepare an order contempt and sentencing. I will attach the original orld of contempt to my sentencing order. And I will incorporate that I set the fine at $500.

I will tell you, if--there is a show cause hearing I could set, I've never really wanted to set that hearing. I didn't want to expand it beyond this, but if everybody thinks it needs to, and where you go, I believe where it goes is that whoever is the individual responsible is the person that it's there for the sanctions, that it's appropriate.

But I believe at this point that the law is and certainly the law that I think is applicable to contempt at standpoint is a fine of--a maximum fine of $500. I'm not going to say $500 per juror. I'm

not going to say $500 for every newspaper that was delivered to the courthouse. I mean I'm not going--It's $500 a case, and that's it. And I believe that is the sanctions under this Court's hearing as it was constituted on March the 6th what I was considering and in the Court signing the order on June the 1st finding the contempt and sentencing today. And the order will be entered.

If there were allowed to this Court a more sizable fine that is more commensurate with the harm and the injury done, I would have assessed it. I have assessed the maximum fine as I understand is appropriate under the laws of Texas for the contempt--criminal contempt that occurred in the jury deliberation process in this case. That to me is absolutely abhorrent of a free society trying to have the kind of jury trial that we had that a free from secret evidence, because as I made it very clear on that day, and let me make it very clear today, I see this as an absolute attack on the integrity of trial by jury and trial as we know them in this nation. I take it most seriously.

That's where I am. You are where you are

(End of Excerpt.)

SCOTTY G. BALDWIN
OFFICIAL COURT REPORTER

Supreme Court, U.S.
FILED
SEP 25 1992
OFFICE OF THE CLERK

(3)

No. 92-285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

v.

THE HONORABLE TONY LINDSAY,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Texas

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

To The Chief Justice And Associate Justices
Of The Supreme Court Of The United States:

Petitioner submits this brief in reply to the numerous legal and factual misstatements made in the brief in opposition filed by Benjamin and Neona Williams, et al.

ARGUMENT

I.

RESPONDENTS LACK STANDING TO FILE A BRIEF IN OPPOSITION

Although the individuals who filed a brief in opposition to the petition for a writ of certiorari choose to label themselves "respondents," in point of fact they were not parties to the mandamus proceeding in the Texas Supreme Court below, nor are they parties to the proceeding before

this Court. They therefore have no standing to file a respondents' brief in opposition, and their brief should not be considered by this Court.

Even if this Court chooses to accept the brief in opposition, however, nothing contained in that brief should prevent the granting of Petitioner's request for a writ of certiorari. While Petitioner stands on the arguments contained in its petition, several assertions made in the brief in opposition raising new matters warrant reply.

II.

THE FILING OF THE BRIEF IN OPPOSITION DEMONSTRATES THAT THE ISSUE RAISED IN THE PETITION IS NOT MOOT

The individual parties named as respondents in the brief in opposition no longer have any interest in this case, because their claims against Petitioner have already been adjudicated. To the extent that anyone connected with the brief in opposition maintains a continuing interest in the issue, it is the attorneys for the plaintiffs in the underlying litigation, some of whom are described in the brief in opposition as "real parties in interest to the proceeding. . . ." (p. ii).

In a sense, this assertion is hardly surprising, since it is plaintiffs' lawyers in general and these lawyers in particular who have the most to gain from maintenance of the status quo in asbestos litigation. They therefore have the most to lose if this Court upholds Petitioner's First Amendment right to shine the spotlight of public attention on the waste and abuse that pervade the existing methods of asbestos adjudication.

Ironically, the very fact that the brief in opposition was filed belies its assertion that the constitutional issue raised by Petitioner is moot. If that were actually the case, pre-

sumably those who authored the brief in opposition would have had no motivation to respond to the petition. It is, no doubt, for the very reason that those attorneys know full well that the issue will once again arise on numerous occasions in the State of Texas that they deemed it necessary to respond.

III.

THE ISSUE OF THE TRUTH OR FALSITY OF PETITIONER'S ADVERTISING IS IRRELEVANT TO THE CONSTITUTIONALITY OF RESPONDENT'S INJUNCTION

The brief in opposition alleges that Keene's advocacy advertising was "false and misleading." (p. 10) While this charge is demonstrably false, and no judge has ever made such a finding, it is totally irrelevant to whether Petitioner's free speech rights have been infringed by the sweeping gag order issued by the Texas state court. Truth or falsity is wholly irrelevant to the level of constitutional protection given to Petitioner's political advocacy. As asserted in Petitioner's original brief in support of its petition and not disputed in the brief in opposition, Petitioner's advertising is not commercial speech, but rather fully protected political expression. In this area, it is not for the State to decide which expression is "true" and which is "false." Rather, as Justice Holmes told us, "the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of our Constitution." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Investing judges with power to decide, *a priori*, which political commentaries are true and which are false would create a society that is very different from the one established by our Constitution.

In any event, the truth or falsity of Petitioner's political advertising is irrelevant to the constitutionality of Respon-

dent's injunction, because there was no hearing on which claims were true and which were false, and the injunction was in no way confined to so-called "false" advertisements. Rather, it prohibited *all* commentary by Petitioner on the specified subjects. Thus, even if one were to accept the constitutionally preposterous suggestion that First Amendment protection turns on the truth or falsity of political expression, Respondent's injunction would nevertheless be grossly overbroad, in clear violation of this Court's precedents. *See, e.g., United States v. Robel*, 389 U.S. 258 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960).

IV.

THE PROCEEDING BEFORE JUDGE WOOD IS IRRELEVANT TO THE CONSTITUTIONALITY OF RESPONDENT'S INJUNCTION

The brief in opposition expends considerable effort in describing the contempt proceeding against Petitioner before Judge Sharolyn Wood in the State District Court in Houston, arising out of Petitioner's publication of an advocacy advertisement in the *Houston Chronicle* while a jury was coincidentally deliberating in a case in which Petitioner was a defendant. (pp. 5-7; 11-12) Other than confirming Petitioner's assertion that the issue before Judge Lindsay is not unique and is therefore likely to arise again in the Texas courts, this discussion bears no relationship to the constitutional issue presented to this Court by Petitioner. It is a completely different case, with a different set of facts.

It is true, as the brief in opposition asserts, that Judge Wood found that Petitioner's advocacy advertisement republishing an editorial from another newspaper (which contravened no previously issued order by Judge Wood) violated stated procedural laws. But even if Judge Wood correctly applied state law (something Petitioner in no

way concedes), that law cannot supersede the First Amendment right of free speech. At no point did Judge Wood give even the slightest attention to the First Amendment arguments presented to her by Petitioner.

Moreover, it should be noted that Respondents knowingly misstate the facts as found by Judge Wood when they assert that "Keene . . . improperly communicated with the jurors. . . ." (p. 4) "Communicate" is defined as "to convey knowledge of or information about." Webster's New Collegiate Dictionary (1981 ed.) p. 225. However, Judge Wood specifically interrogated each juror and each juror testified that he or she had not seen the advocacy ad in question or any other media report on asbestos, in accordance with the instructions Judge Wood had given at the outset of the trial. In short, the judge employed an accepted, less restrictive approach to shielding the jurors from outside influences: she instructed them not to read or watch media reports on asbestos. It worked.

Nonetheless, at Respondents' urging, Judge Wood held Petitioner in criminal contempt without a hearing. Judge Wood's action, when viewed in conjunction with the action by Judge Lindsay in this case, demonstrates a pattern of pervasive hostility against Petitioner's free speech rights on the part of the Texas courts. Thus, the matter is not moot, as found by the Texas Supreme Court, but is "capable of repetition yet evading review."

V.

THE BRIEF IN OPPOSITION UNDERSCORES THE NEED FOR THIS COURT'S INTERVENTION TO PROTECT A LITIGANT'S FIRST AMENDMENT RIGHT TO ENGAGE IN POLITICAL EXPRESSION DURING TRIAL

Like Judge Wood in the contempt proceeding, Judge Linsday in this case evinced absolutely no familiarity with or sensitivity to the role which the First Amendment

plays as a limitation on state power to regulate a litigant's speech. When viewed together, the behavior of the two Texas States Judges presents an ominous portrait of the stature of the First Amendment in the state courts of Texas.

Indeed, the brief in opposition itself illustrates the difficulties that Petitioner has faced—and no doubt will continue to face—in asserting its First Amendment rights in the state courts of Texas. It contains numerous misstatements about the scope of litigants' First Amendment rights against prior restraints. Amazingly, it makes not a single mention of this Court's landmark decision in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), despite the case's obvious relevance to the constitutional claim asserted by Petitioner. Even if one were ultimately to conclude (incorrectly, Petitioner contends) that *Nebraska Press* is distinguishable from the present case, surely that decision must at least be considered and the basis of its distinction from the present case explained. Yet the brief in opposition fails even to acknowledge the case's existence. Even more troubling is the fact that neither Judge Wood nor Judge Lindsay even mentioned the case, much less attempted to distinguish it, despite the fact that both were imposing significant restrictions or penalties on Petitioner's exercise of its right to freedom of speech. Nor did either Texas appellate court to rule in this case ever discuss *Nebraska Press*.

CONCLUSION

This Court is today presented with a situation in which neither the Texas state courts nor the plaintiffs in the underlying litigation, who together have imposed substantial limitations on Petitioner's free speech rights, ever *mentioned*, much less attempted to distinguish, the best

known decision of this Court concerning the interrelation of free speech and the trial process.[1] Surely, our system has malfunctioned when such a result occurs.

It is this Court's role to intervene to remedy such malfunctions, and to assure that pervasive state violations of constitutional rights not be allowed to continue. For this reason, this Court should grant the petition for certiorari.

Respectfully submitted,

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[1] The only court actually to have considered the relevance of *Nebraska Press* to an injunction against Petitioner's publication of advocacy advertisements during trial, the Maryland Court of Special Appeals, held such an injunction unconstitutional. *Keene Corp. v. Abate*, 608 A.2d 811 (Md. App. 1992) (reproduced in the appendix to the Petition for Writ of Certiorari, pp. 70-81).